Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

TOWN OF NEWBURGH, NY; CHARLES M. KEHOE, Chief of Police, Town of Newburgh Police Department,

Petitioners,

vs.

JOSEPH H. HOLZAPFEL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a claim for unpaid overtime by an employee, should the jury be instructed to consider the reasonableness of the amount of time spent by the employee in performing his work activities when the employer is unable to supervise the employee's activities?

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Petitioners, the Town of Newburgh, New York and Charles M. Kehoe, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Holzapfel v. Town of Newburgh,* 145 F.3d 516 (2d Cir. 1998). The opinion of the District Court denying plaintiff's motion for summary judgment is reported at *Holzapfel v. Town of Newburgh,* 935 F. Supp. 418 (S.D.N.Y. 1996). The opinion of the District Court denying plaintiff's motion for judgment as a matter of law and a new trial is reported at 950 F. Supp. 1267 (S.D.N.Y. 1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on May 27, 1998. The Court of Appeals denied a timely petition for rehearing on July 16, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Fair Labor Standards Act, 28 U.S.C. § 207.

STATEMENT OF THE CASE

The fundamental question in this case is whether, in a claim for unpaid overtime, the jury should be instructed to consider the reasonableness of the amount of time spent by the employee

in performing his work activities when the employer is unable to supervise the employee's activities.

A. Factual Background of the Case

Plaintiff, Joseph H. Holzapfel ("Holzapfel"), became a police officer in the Town of Newburgh Police Department in 1990. Town of Newburgh police officers work an eight-hour shift, five days a week. In September 1991, Holzapfel was selected to be a police dog (K-9) handler by Police Chief Charles Kehoe ("Kehoe"). Holzapfel was assigned a German Shepherd named Bandit and the Town sent Holzapfel and Bandit to a fourteen week training program at the Orange County Sheriff's K-9 training facility.

Under the Town's Standard Operating Procedures ("SOP") each officer keeps his police dog at his home. The Town constructs a kennel on each officer's property, provides food for the dog, and pays for any necessary equipment and veterinary care. The officer is responsible for feeding the dog once a day, ensuring that the dog has fresh water, brushing the dog once a day, giving the dog its heartworm medicine, keeping its nails clipped and providing the dog with shelter. The K-9 officers receive two full paid days of training each month and the Town pays each of its police dog handlers two hours of overtime per week. The SOP states that police dog handlers "are encouraged to work their dogs during their tour of duty, when time permits, in areas that they are weak in, or on special training needs as designated by the trainer or Sgt. in charge."

Holzapfel worked as a dog handler until May 9, 1995. At that time he received an on the job injury and has been on injury leave since that date receiving his full pay pursuant to New York General Municipal Law § 207-c. While out on injury leave Holzapfel filed this suit alleging that he spent 45 hours per

week while off-duty performing activities related to his position as a police K-9 handler that he should be compensated for as required overtime. Holzapfel also alleged that he spent additional time helping to train another K-9 officer's dog which he should have been compensated for as required overtime.

B. The Proceedings Below

A jury trial was conducted in September, 1996 before Hon. William C. Conner in the United States District Court for the Southern District of New York. The jury returned a verdict in favor of defendants. Plaintiff then filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and a motion for a new trial pursuant to Fed. R. Civ. P. 59. The District Court denied plaintiff's motions. Plaintiff then filed his appeal in the Second Circuit Court of Appeals. The basis for plaintiff's appeal was that the jury instructions and verdict questions were improper. The Court of Appeals affirmed in part, reversed in part, and remanded for a new trial. The part that the Court of Appeals reversed was in regard to plaintiff's claim for overtime for the care of his own dog. The Court of Appeals affirmed the part regarding plaintiff's claim for overtime for assisting in the training of the other officer's dog.

The relevant portions of the jury instructions which relate to the issues raised in this writ of certiorari are as follows:

> Plaintiff is entitled to compensation for such additional overtime work if and only if it was performed either at the direction of the employer or if the employer actually knew or reasonably should have known that work was being performed and condoned or acquiesced in its performance. The plaintiff need not show that the defendant expressly authorized the off hours work beyond the two hours

per week for which he was compensated. Instead, it will suffice for plaintiff merely to show that he was assigned duties which could not reasonably be performed during normal working hours or during the two hours of overtime per week for which he was paid.

However, even if plaintiff can show that his duties of feeding, grooming, caring for and training the dog could not be performed within the normal forty hour week and two hours of overtime per week, that does not mean that he is entitled to an award of compensation for all of the additional hours that he actually spent on such duties. Instead, he is entitled to compensation for only such additional time as was principally required for the performance of such duties.

In making that determination you should, of course, consider the extent, if any, to which such duties could reasonably have been performed during normal working hours. Thus, to summarize, the plaintiff is entitled to an award of compensation for any time over and above the forty hours of regular time plus two hours of overtime per week which he worked, provided that additional work was reasonably required to be performed to fulfill his duties feeding, grooming, caring for and training the dog assigned to him and further, provided that it could not reasonably be performed within the 42 hours per week for which the plaintiff was compensated.

In reversing, the Court of Appeals opined:

> In our view, looking at the totality of the circumstances, the improper verdict question and instructions could have prejudiced plaintiff. Even if the work was not "reasonably required," nonetheless the employee may be compelled or pressured by the employer to do it, and if so, should be compensated for doing it.

(App. p. 13a).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT REGARDING THE CONSIDERATION OF THE REASONABLENESS OF THE AMOUNT OF TIME AN EMPLOYEE SPENDS PERFORMING A TASK FOR WHICH THAT EMPLOYEE IS CLAIMING OVERTIME COMPENSATION.

The issue in this case was not whether the specific tasks performed by the plaintiff were reasonable or not. The parties agreed that the types of tasks performed were tasks that could be considered as work. The issue was the reasonableness of the time allegedly spent by plaintiff performing the various tasks.

The Second Circuit Court of Appeals obfuscated this issue by distinguishing the type of work performed in the case *sub judice* with the type of work that was at issue in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) and *Amos v. United States*, 13 Cl. Ct. 442 (1987). The Second Circuit's decision represents

a split in the circuits with regard to the issue of whether an employer is required to pay for work performed by an employee wherein the employee expends an unreasonable amount of time performing that work and the employer is not able to directly supervise that employee during the performance of that work.

In *Amos v. United States,* plaintiffs were "cook foremen" at the Federal Correctional Institutions at Petersburg, Virginia and Big Spring, Texas. One of the issues was whether the plaintiffs should be compensated for time spent going to the central control room to obtain certain equipment essential to the performance of their duties. The Court found that this activity was compensable but that not all of the time spent going to and from the control room was necessarily compensable. *Amos* at 450. The Court determined that plaintiffs were only entitled to compensation for that amount of time reasonably required to obtain and return the necessary equipment and for that amount of time reasonably required to walk to and from the food service area. *Id.* The Court reasoned that, "[t]o rule otherwise would run the risk of rewarding plaintiffs for lack of diligence. . . ." *Id.* The Court further ruled that, at trial, the plaintiffs would have the burden of establishing the time that each plaintiff reasonably spent performing those activities. *Id.*

The aforementioned determinations by the court in *Amos* were cited with approval by the District Court in *Reich v. IBP, Inc.* Defendant was a company engaged in the slaughter, processing and packing of beef and pork. At issue was whether the production employees should be compensated for time spent in various activities including obtaining equipment, changing clothes and cleaning up. After determining which activities were compensable, the court held that, "[e]mployees are entitled compensation for the reasonable time (rather than the actual time) required to put on personal protective gear and obtain sharpened knives." *Id.* at 1329. The Court of Appeals upheld

the District Court's determination that reasonable time was appropriate since "there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place." *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994).

In the case *sub judice* there was also considerable discretion and flexibility on the part of the plaintiff in performing his dog care activities, thus requiring the consideration of the reasonableness of plaintiff's activities.

The Second Circuit described the type of work at issue in *Reich* and *Amos* as relatively time-defined and the tasks involved in dog care activities as incapable of being time-defined. (App. pp. 18a and 19a). The opinion by the Second Circuit thus creates the situation wherein a determination must first be made whether a particular task performed by an employee is relatively "time-defined" or not. This will create added confusion and a new issue for employers and employees to disagree over with regard to the payment of overtime. This will inevitably lead to further litigation over which tasks are time-defined and which tasks are not. Such a distinction is artificial and need not be created.

The District Court's jury instructions only required the plaintiff "to show that he was assigned duties which could not reasonably be performed during normal working hours or during the two hours of overtime per week for which he was paid." The District Court's instructions that the plaintiff "is entitled to compensation for only such additional time as was principally required for the performance of such duties" and that "[i]n making that determination you should, of course, consider the extent, if any, to which such duties could reasonably have been performed during normal working hours" are consistent with the FLSA standard that,

> an activity constitutes "work" if it involves physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

If plaintiff could reasonably have performed his required dog care activities within the 40 regular hours and two overtime hours for which he was compensated each week and he chose not to, then his activities would not have been pursued necessarily and primarily for the benefit of the employer. *Amos v. United States*, 13 Cl. Ct. 442 (U.S. Cl. Ct. 1987); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993), *aff'd and remanded*, 38 F.3d 1123 (10th Cir 1994).

It was for the jury to determine, as an issue of fact, how much of the time allegedly spent by plaintiff caring for his dog was primarily for the employer's benefit. This determination necessarily required that the jury consider how much time was reasonably required to perform the required duties and whether these duties could have reasonably been performed during the 42 hours per week for which plaintiff was compensated.

CONCLUSION

This case presents a question of exceptional importance in the area of labor and employment law and the application of the overtime provisions of the Fair Labor Standards Act. The opinions of the Second Circuit and the Tenth Circuit cannot co-exist. The Second Circuit's opinion will cause further disagreement among employers and employees over the classification of work into the categories of "time-defined" or not "time-defined", thus leading to further litigation. If an employee acts unreasonably in the performance of his work and the employer is not in a position to monitor that employee's work, the employer should not be liable for the overtime accumulated by that employee.

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED MAY 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1997

(Argued September 4, 1997 Decided May 27, 1998)

Docket No. 97-7114

JOSEPH H. HOLZAPFEL, And others similarly situated,

Plaintiff-Appellant,

—v.—

TOWN OF NEWBURGH, NY; CHARLES M. KEHOE, Chief of Police, Town of Newburgh Police Department,

Defendants-Appellees.

Before:

CARDAMONE, MINER, and LEVAL,

Circuit Judges.

Plaintiff Joseph H. Holzapfel appeals from (1) a judgment entered in the United States District Court for the Southern District of New York (Conner, J.) on September 12, 1996 in favor of defendants Town of Newburgh and Charles M.

Kehoe, Chief of Police for the Town of Newburgh Police Department, and (2) an order entered on January 16, 1997, which denied plaintiff's motion for judgment as a matter of law and for a new trial.

Affirmed in part, reversed in part, and remanded for a new trial.

ALAN S. KAUFMAN, Albany, New York (Jeffrey Chamberlain, Chamberlain and Kaufman, Albany, New York, of counsel), *for Plaintiff-Appellant.*

DANIEL J. SCHNEIDER, Newburgh, New York (Drake, Sommers, Loeb, Tarshis & Catania, P.C., Newburgh, New York, of counsel), *for Defendants-Appellees.*

CARDAMONE, *Circuit Judge*:

This appeal centers on a K-9 police officer, Joseph H. Holzapfel, who in undertaking to care and provide for the needs of his assigned police dog, claims a substantial amount of overtime for tasks he performed at home. Plaintiff alleges that although he spent 44-45 hours off-duty each week looking after his dog, "Bandit," he received only two hours per week of overtime pay pursuant to police department policy.

Holzapfel brought suit in December 1995 against his employer, the Town of Newburgh, New York, and its Chief of Police, Charles M. Kehoe, alleging violations of the overtime pay provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* Section 207(a) of that Act makes it

unlawful to employ an individual "for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Plaintiff also sought compensation for off-duty hours he spent training a fellow K-9 police officer's dog.

He appeals from a September 12, 1996 judgment entered against him in the United States District Court for the Southern District of New York (Conner, J.), following a jury trial that returned a verdict in favor of the defendants. Plaintiff also appeals from a January 16, 1997 order denying his motion for judgment as a matter of law and for a new trial. *See Holzapfel v. Town of Newburgh* (*Holzapfel II*), 950 F. Supp. 1267 (S.D.N.Y. 1997).

What we are asked to decide on this appeal is captured in an aphorism: "Every dog has his day, and every man his hour." Bandit was intelligent enough to be selected as a K-9 trainee, and plaintiff has a right to seek, although not necessarily obtain, overtime pay for the hours he spent working with the dog. Underlying this claim however, is the more practical and serious question of whether a municipality that believes such dogs are useful adjuncts in crime investigation and prevention should be required, if indeed it can afford, to pay overtime for all of the at-home hours spent with them. We of course cannot answer that question. But we can provide guidance to the trial court regarding the instructions it should give the jury in this sort of case.

BACKGROUND

Plaintiff became a police officer for the Town of Newburgh in 1990. A year later, he successfully applied to Chief Kehoe to become a K-9 officer to work with specially trained police

dogs. Bandit was assigned to him. Officer Holzapfel worked as a K-9 officer on active duty until he took injury leave on May 9, 1995.

A. *Care, Maintenance, and Training of "Bandit"*

Once Bandit was assigned to plaintiff, the defendant Town of Newburgh supplied training aids, toys, food, and veterinary care for the dog. It sent plaintiff and Bandit for 14 weeks of training at the Orange County K-9 Facility where instruction was given on a variety of subjects: obedience training; agility; tracking; box, article, and building searches; car stops; and criminal apprehension. At the end of the training period, instructors recommended that plaintiff continue training with the dog as much as possible.

Bandit remained with plaintiff at home and at work. Standard operating procedures for the Town of Newburgh assigned K-9 officers responsibility for all aspects of care, maintenance and training for their dogs. The Town scheduled two days per month for retraining, at which time the instructors told plaintiff to work on problem areas between sessions. In 1994, Officer Holzapfel took Bandit back to school for training in narcotics detection and engaged in further narcotics training subsequent to receiving his certification. Plaintiff contends that, in addition to the 40-hour scheduled shifts he worked weekly for the Newburgh Police Department, he spent between 44-45 off-duty hours each week grooming, bathing, feeding, exercising, training, and cleaning up after Bandit.

As a standard policy, the Town of Newburgh paid K-9 officers two hours of overtime each week. Pursuant to instructions, plaintiff filled out the weekly overtime slip in advance, rather than calculate the actual off-duty hours spent with Bandit after they occurred. Although Officer Holzapfel was

told that he would be paid for only two overtime hours per week, he was never directed to limit his off-duty activities to those two hours for which he was compensated.

Various members of the police department, including Chief Kehoe, were aware that K-9 officers assumed additional duties. Estimates as to the time involved varied among the trial witnesses. Chief Kehoe acknowledged that the responsibilities—exclusive of training—could add up to at least one hour per day. He was also aware that K-9 officers, including plaintiff, engaged in off-duty training, but did not know how much extra time these officers spent off-duty with their dogs.

B. *Training Officer Patricola's Dog*

Anthony Patricola was a K-9 police officer who had been assigned a dog that had flunked out of the Town of Newburgh's K-9 training school. In 1995 plaintiff attended a training class offered by the Orange County Sheriff's Department with his wife's Rottweiler. After Patricola approached him, two weeks into the class, plaintiff requested permission from the Sheriff's Department to work with Patricola's dog during the training class, and Department trainers consented.

Officer Holzapfel then asked Chief Kehoe to be assigned to work with Officer Patricola's dog. The Chief responded that he could not pay him, but that if Holzapfel wanted to, he could switch shifts and work with the dog on his own time. Plaintiff subsequently changed his hours so as to work with both Officer Patricola's dog and his wife's dog at the training class.

C. *Proceedings in District Court*

After initiating suit, plaintiff moved unsuccessfully for summary judgment. *See Holzapfel v. Town of Newburgh* (*Holzapfel I*), 935 F. Supp. 418 (S.D.N.Y. 1996). Following

the trial, the district judge asked counsel for proposed jury instructions and questions, but ultimately fashioned his own. The text of the first question read:

> Has the plaintiff Joseph H. Holzapfel proved by a preponderance of the credible evidence that he spent additional time, over and above the 40 hours of regular time plus 2 hours of overtime per week for which he was compensated, in performing work which was (1) *reasonably necessary* to fulfill his duties of feeding, grooming, caring for and training the K-9 unit dog assigned to him and (2) which could not *reasonably be performed* within such 42 hours of compensated time per week? (emphasis added).

The jury answered this first question in the negative.

The second verdict question asked the jury:

> Has plaintiff proved by a preponderance of the credible evidence that he performed additional work in training the K-9 unit dog assigned to Police Officer Anthony Patricola at the direction of defendant Town of Newburgh Police Department or with their knowledge and acquiescence and with the reasonable expectation that he would be compensated for such work?

Again, the jury answered in the negative. The remaining two questions were to be answered only if defendants were liable to plaintiff. Since the jury found no liability, the substance of these questions is not at issue on appeal.

After the jury returned its verdict, plaintiff moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and for a new trial pursuant to Fed. R. Civ. P. 59. Judge Conner denied both motions.

On appeal, plaintiff contends that the two verdict questions accompanying the trial court's instructions are contrary to principles established under the FLSA and that, therefore, he is entitled to a new trial. In addition, Holzapfel argues that he is entitled to judgment as a matter of law with respect to his claim for compensation for the time he spent training Officer Patricola's dog.

DISCUSSION

Standard of Review

The substance of jury instructions is reviewed *de novo*. *See United States v. Masotto*, 73 F.3d 1233, 1238 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 54 (1996). A jury verdict will be reversed only when an appellant can show that the instructions considered as a whole prejudiced him. *See Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994). An error exists if the jury was misled about the correct legal standard or was otherwise inadequately informed regarding the controlling law, and where such error is other than harmless, a new trial is required. *See id.*

First Jury Question

I Question of Fact or Law

Before examining the merits of this case, it must first be determined who decides what constitutes compensable work under the FLSA. Different circuits have applied different standards. *Compare Nichols v. City of Chicago*, 789 F. Supp. 1438, 1441 (N.D. Ill. 1992) ("Whether an activity is preliminary or postliminary to a principal activity is a question of fact.") (citing *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283, 286 (5th Cir. 1969), *with Andrews v. DuBois*, 888

F. Supp. 213, 216 n.5 (D. Mass. 1995) ("The First Circuit has held that the determination of whether an activity is an integral and indispensable part of the employees' principal activity is a question of law. . . .") (citing *Ballou v. General Elec. Co.*, 433 F.2d 109, 111 (1st Cir. 1970)). The present parties both presume the question is one of law. This presumption strikes us as an oversimplification for, as Judge Conner correctly observed, whether plaintiff is entitled to overtime pay is a mixed question of law and fact. *See Holzapfel II*, 950 F. Supp. at 1275.

Authority for that proposition derives from our own and Supreme Court precedent. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("The question of how the respondents spent their working time on board the Arctic Star is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law. . . ."); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981) ("FLSA claims typically involve complex mixed questions of fact and law—*e.g.*, what constitutes . . . 'principal' rather than 'preliminary or postliminary activities.' "); *Freeman v. National Broad. Co., Inc.*, 80 F.3d 78, 82 (2d Cir. 1996) ("While we may not disturb the district court's factual findings as to the nature of the plaintiffs' employment absent clear error, we review *de novo* the correctness of the trial court's ultimate conclusion that the plaintiffs are not exempt journalists [under the FLSA].").

Thus, in the case at bar, the trial judge was responsible for determining as a matter of law whether plaintiff's activities could potentially constitute "work." The jury was to decide as a question of fact, not only how much of plaintiff's time spent with Bandit fell within the court's definition of "work" and would be compensable, but also how much of that time was spent with the employer's actual or constructive knowl-

edge. If the time plaintiff spent working amounted to more than the two hours per week for which plaintiff was compensated, the district court was then to apply the overtime provisions of the FLSA.

II What Activities Constitute "Work"

Analysis turns first to work as defined in the law. Work is defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Work need not be performed during scheduled on-duty hours for an employee to receive compensation. *See Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding that employees must be compensated for "activities performed either before or after the regular work shift . . . if those activities are an integral and indispensable part of the principal activities for which covered [employees] are employed"). Neither may overtime compensation be denied solely on the grounds that the employee could have completed his tasks during scheduled hours, thereby avoiding the need for overtime altogether. *See* 29 C.F.R. § 785.11 (1997); *see also Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 419 (5th Cir. 1975).

Consistent with precedent in this Circuit, the district court stated that "a K-9 officer must be compensated for the off-duty time that he spends performing the tasks involved in caring for and training his assigned police dog, unless the time devoted to a particular task is *de minimis*." *Holzapfel I*, 935 F. Supp. at 422; *see also Holzapfel II*, 950 F. Supp. at 1275. In *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995), we agreed that "walking, feeding, training, grooming and cleaning up are integral and indispensable

parts of the handler's principal activities and are compensable as work." We further held that officers of the New York City Transit Authority, to the extent they had to deal with their assigned dogs during their commute to work, *e.g.*, by stopping to take them for a walk during the commute or by cleaning up after the occasional bout of carsickness, were entitled to compensation for this "true dog-care work." *Id.* at 652. Although compensation was ultimately denied the dog handlers in that case, it was because these occasions were found to be so infrequent and of such brief duration that the work involved was ruled *de minimis*. *See id.* at 653.

Other courts have held that K-9 officers are to be compensated for certain activities performed at home with their dogs. *See generally Rudolph v. Metropolitan Airports Comm'n*, 103 F.3d 677, 681 (8th Cir. 1996) (implicitly acknowledging that feeding, grooming, and exercising are compensable work while determining that a regulation deferring to the terms of a reasonable agreement applied); *Karr v. City of Beaumont*, 950 F. Supp. 1317, 1322-23 (E.D. Tex. 1997) (holding as a matter of law that the post-shift time plaintiffs spent caring for their police dogs is, a principal activity for which they are entitled to overtime compensation); *Andrews*, 888 F. Supp. at 217 (determining that feeding, grooming, and walking are indispensable parts of maintaining dogs as law enforcement tools, that such activities are closely related to the duties of a K-9 officer, and that therefore, they are time spent working); *Levering v. District of Columbia*, 869 F. Supp. 24, 27 (D.D.C. 1994) ("[F]eeding, exercising, and caring for the dogs by officers assigned to the canine detachment constitutes an 'integral and indispensable part' of the officers' work activities, and, as such, time spent on those activities is compensable under the Fair Labor Standards Act."); *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277, 279 (E.D. Va. 1992) (same).

Appendix A

III Time Claimed by Plaintiff as "Work"

A. *Concern Regarding Plaintiff's Claims*

Once the district court ruled that time spent feeding, grooming, training, exercising, and otherwise caring for Bandit could be compensable, whether Officer Holzapfel actually engaged in such "work" and how much compensable time he spent on those compensable activities were questions of fact for the jury.

An uncritical application of the definition of work, set forth in the preceding section, might lead one to believe that Officer Holzapfel should receive overtime pay for all the hours he testified to having devoted to Bandit's well-being, since we had said in *New York City Transit Auth.* that "true dog-care work" is compensable. *See* 45 F.3d at 651. Yet common sense and policy concerns argue against such a result. At some point, an officer's attention to his assigned dog may not be provided primarily for the employer's benefit but rather out of the caretaker's own sense of love and devotion to the animal in his charge. *Cf. Rudolph*, 103 F.3d at 684 ("Any time beyond the half-hour [provided in a compensation agreement] plaintiffs spent with their canine charges we presume stemmed from their personal devotion to the dogs, and was, therefore, not 'predominantly for the benefit of the employer'. . . .").

B. *District Court's Approach*

Without some distinction being drawn between compensable and non-compensable time spent by a K-9 officer on an assigned dog, municipalities and their law enforcement units could be obliged to pay large amounts of overtime. Carried to an extreme, this view would ultimately lead to the demise of K-9 officer programs because they would become cost-prohibitive. The district court expressed this type of concern,

stating it was not going to charge that plaintiff is entitled to recover for every hour he claims he spent with Bandit or even for all of the hours the jury thinks he spent "unless those hours were reasonably related to what the job requires."

While sharing this concern, we nevertheless think the trial court erred when instructing the jury in this manner. It inserted the qualification "reasonably necessary" in the verdict question and emphasized in its post-trial opinion that Officer Holzapfel's care for Bandit should be "reasonable" and "sufficiently related" to what his employer expected. *See Holzapfel II*, 950 F. Supp. at 1273. The flaw in this approach is that the word "reasonable" is not found in the definition of "work." Rather, the key phrases are "controlled or required," "necessarily and primarily," "integral and indispensable." *See Tennessee Coal, Iron & R.R. Co.*, 321 U.S. at 598; *Steiner*, 350 U.S. at 256. The difference is significant. An employer may require its employee to perform tasks that appear unreasonable, but which nevertheless are performed necessarily and primarily for the employer's benefit, and for which therefore the employee is entitled to be paid. Conversely, an employee may perform a task that seems reasonable in the context of his work, but which the employer neither required nor controlled, and for which therefore the employee is not entitled to be paid.

The subject of the "reasonableness" of the officers' activities was not discussed in *Reich v. New York City Transit Authority*. Instead, we focused only on what activities by a K-9 officer actually would be compensable work, and how much time that work involved. The trial court should have put the jurors in the present case on a similar path. The *Tennessee Coal* test can be helpful to the jury in furnishing a basis for determining the amount of time spent in such a task that should be compensated. When the parties dispute

whether the employee expended excessive time in the performance of a compensable task, the jury might be instructed to consider, initially, whether that amount of time was required by the employer. When the answer to this question is, "yes," the time is compensable, and the jury need not proceed to the next question.

If, however, the employer did not require the expenditure of the contested time, the jury should then consider whether the employee expended this time primarily for the benefit of the employer. If the employee was motivated primarily by his or her own pleasure, then the time was not expended primarily for the employer's benefit and it is not compensable; similarly, if the time was expended primarily to inflate the employee's earnings, then the time was not primarily for the employer's benefit and is not compensable. On the other hand, if the employee was devoting the allegedly excessive time to the task primarily for the employer's benefit, then the employee has satisfied his burden as to this part of the test. Armed with this common law definition of work given by the Supreme Court, and aware of the emphasis on the key phrases, the jury would have been properly equipped to delineate how much, if any, of Officer Holzapfel's off-duty caretaking entitled him to overtime pay.

In our view, looking at the totality of the circumstances, the improper verdict question and instructions could have prejudiced plaintiff. Even if the work was not "reasonably required," nonetheless the employee may be compelled or pressured by the employer to do it, and if so, should be compensated for doing it.

Considering that the evidence could support a conclusion that the Town of Newburgh required its K-9 officers to work more than two overtime hours per week—its standard operating procedures stated that K-9 officers were responsible for

all aspects of care, maintenance, and training for their dogs; and Chief Kehoe acknowledged that an officer could spend up to an hour per day caring for a dog, even without training—we believe a different jury should be given the opportunity to consider the evidence under the correct test set forth in the law.

As we noted earlier, some handlers, like some owners, out of love and devotion for their dogs, may choose to spend a great amount of time with them. It might be appropriate therefore for the trial court to explain to the jury that if it finds some of plaintiff's claimed overtime hours per week are on account of personal devotion to the dog, such time spent would not represent compensable work required by the employer or principally for its benefit.

IV Defendants' Awareness of Plaintiff's Activities

A. *Law in General*

For compensation to be awarded, plaintiff's activities must not only satisfy the above definition of work, but must also be performed with the employer's knowledge. Work performed off-site must be counted as time worked only "[i]f the employer knows or has reason to believe that work is being performed." 29 C.F.R. § 785.12 (1997); *see also* 29 C.F.R. § 785.11 (1997) ("[I]f the employer knows or has reason to believe that [the employee] is continuing to work . . . the time is working time."); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("[A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [29 U.S.C.] § 207 [mandating overtime pay].").

Moreover, once an employer knows or has reason to know that an employee is working overtime, it cannot deny com-

pensation even where the employee fails to claim overtime hours. *See Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959); *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995); *Forrester*, 646 F.2d at 414. An employer need not have actual knowledge of such off-site work; constructive knowledge will suffice. *See Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994).

This knowledge requirement is what makes 29 C.F.R. § 553.102 (1997) inapplicable to the case at hand. That regulation prohibits public employees from volunteering to perform the same type of services for the public agency by whom they are employed. Plaintiff advances an argument that he must be compensated for all of his time spent caring for and training Bandit since he cannot volunteer to do that for which he is already hired. We are unable to adopt this notion because it could establish municipal liability to pay overtime the employer may not have known was accumulating. While an employer must pay for work it suffers or permits, *see* 29 C.F.R. § 785.11, an employer cannot suffer or permit an employee to perform services about which the employer knows nothing. Presumably for this reason, 29 C.F.R. § 785.12 inserts knowledge as a required element when an employee must be paid. Just as an employee is not working for the employer's benefit if the employer has no knowledge of it, so similarly, an employee cannot be considered to have volunteered his services in the sense of 29 C.F.R. § 553.102 if the employer is unaware that such services are being performed.

B. *Trial Court's Resolution of Employer's Knowledge*

The district court aligned the facts of this case with the Fifth Circuit's *Newton* case and distinguished the 11th Circuit's *Department of Conservation and Natural Resources* in

deciding what standards were appropriate for determining defendants' constructive knowledge. *See Holzapfel II*, 950 F. Supp. at 1276-77. On its face, *Newton* appears to be precisely parallel to the instant case. It involved a plaintiff police officer who sued the City of Henderson, Texas, to recover overtime pay for his work with the East Texas Drug Task Force. The Fifth Circuit reversed the district court's award of back-pay and liquidated damages, holding that the police chief was not responsible for checking into the overtime activities of this undercover officer, even though the chief had access to the information. *See Newton*, 47 F.3d at 749.

A close look at the reasoning reveals significant differences with the case at hand. *Newton* found in favor of the Town because: the chief explicitly ordered the officer not to work unauthorized overtime hours; the department had a "flex time" policy in place to counter-balance overtime hours; and the officer ignored the order and policy, and never demanded payment for overtime he claimed he had worked. *See id.* In contrast, Officer Holzapfel was not told to limit his activities to two hours per week, but rather was simply told that he would not be paid for more hours than that. Further, he was obligated under the Town's standard operating procedures to provide Bandit with proper care and training. There was no alternative scenario in the Town of Newburgh under which a K-9 officer would receive some form of compensation for extra hours required to tend to his police dog, such as the "flex time" policy offered by the City of Henderson. Hence, it may not be said that Officer Holzapfel failed to claim compensation because he was given no opportunity to do so.

Contrary to the district court's view, we think the instant case more closely resembles *Department of Conservation and Natural Resources*. There, suit was brought on behalf of conservation enforcement officers for unpaid overtime work they

performed during deer hunting seasons over a three-year period. *See Department of Conservation and Natural Resources*, 28 F.3d at 1078-79. The Eleventh Circuit held that the agency had knowledge of this overtime work, despite repeated warnings by supervisors that overtime was prohibited. The court reasoned that because the agency had received the results of a study showing that unreported overtime was a continuing problem, and because weekly arrest reports during the deer hunting seasons revealed that enforcement officers worked more hours than they reported, the agency had both actual and imputed knowledge of the overtime. *See id.* at 1083.

Here Chief Kehoe admitted having knowledge of at least some of plaintiff's overtime activities. The chief testified he saw plaintiff engaged in off-duty K-9 training. Moreover, the chief acknowledged that the off-duty responsibilities of a K-9 officer could reach close to one hour per day, exclusive of training. That suggests Chief Kehoe knew K-9 officers could be working close to seven overtime hours per week. This evidence was sufficient for a jury to find the chief had actual as well as constructive knowledge that plaintiff worked more than two overtime hours per week.

The district court never directly instructed the jury to decide whether defendants had knowledge of plaintiff's overtime. Instead, it asked the jury to decide whether plaintiff's duties "could not reasonably be performed within such 42 hours of compensated time per week." The district court apparently thought that if plaintiff's K-9 responsibilities were so extensive they could not have been performed in his regular shift plus the two hours overtime, "constructive knowledge might be imputed" to defendants. *Holzapfel II*, 950 F. Supp. at 1276. Yet, as the above discussion of *Department of Conservation and Natural Resources* demonstrates, more than one way exists to show constructive knowledge, and it

is not exclusively dependent on whether assigned duties could reasonably be performed in an allotted number of hours. *See* 29 C.F.R. §§ 785.11 & 785.12; *see also Forrester*, 646 F.2d at 414. Thus, the instructions given were too limited. The jury might well have reached a different result had appropriate instructions been given it regarding the employer's knowledge of plaintiff's overtime work.

V How Much Time a Task Should Take

Although we believe the issues regarding the first instruction have been adequately addressed by the above analysis, we must give attention to two cases cited in both briefs and in the district court's opinion denying plaintiff's motion for a new trial. The district court relied upon *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), and *Amos v. United States*, 13 Cl. Ct. 442 (1987), to justify inserting the "reasonableness" element in the first question given the jury regarding how much overtime plaintiff performed. The *IBP* and *Amos* courts both expressed concern regarding the time in which employees would complete a relatively "time-defined" task.

In *IBP*, after holding that employees in a meat processing plant should be paid for picking up, putting on, cleaning, and taking off protective gear, the Tenth Circuit concluded that the employer had to pay for only the reasonable amount of time it would take for a person to complete such duties. *See IBP*, 38 F.3d at 1127. This conclusion rested on the finding by the trial court that employees exercised "considerable flexibility and personal discretion with regard to the time and speed [at which] these activities took place." *Id.* Although roughly the same amount of time was involved in performing these tasks as a whole, some employees did them in immediate succession, while others took breaks in between. The Tenth Circuit did not believe that employees should be paid for the span of time it *actually* took them to conduct the req-

uisite activities, and therefore determined that the appropriate measure was a "reasonable time."

Likewise, the *Amos* court had first to decide whether cook foremen at a correctional institution needed to be paid for walking to and from the control room to pick up necessary equipment. After determining that the activity was compensable, the Claims Court imposed a "reasonable time" limit in light of the fact that the absence of such a standard would risk rewarding employees for "lack of diligence." *Amos*, 13 Cl. Ct. at 449-50.

None of the K-9 officer compensation cases that we found address the issue of how long dog care duties should take. In some instances the amount was small enough to prevent undue concern. *See generally New York City Transit Auth.*, 45 F.3d at 652-53 (*de minimis* time); *Levering*, 869 F. Supp. at 27 (30 minutes overtime). In another, the officers and the employer reached a prior agreement setting the amount of overtime that would be awarded. *See Rudolph*, 103 F.3d at 679-80 (one-half hour overtime per day). In most cases, the courts were ruling on summary judgment motions, in which they determined only that at-home dog care is compensable, without addressing the amount of overtime involved—a decision the district court here also stopped short of making in its ruling on plaintiff's summary judgment motion. *See Holzapfel I*, 935 F. Supp. at 424.

The individual traits and needs of officers and animals preclude any easy determination as to what is a "reasonable time" for a K-9 officer to take care of his dog. Moreover, the varying amounts of time attested to at trial, in addition to the ranges of time involved in the K-9 compensation cases, suggest no clear-cut answer will be found.

We have already noted our concern with the fact that were a K-9 officer left to his own devices, he may ultimately

bankrupt a K-9 unit with claims for too many unsupervised overtime hours. We are nonetheless also confident that if a jury receives proper verdict questions and instructions, it can discern how many hours of compensable "work" were performed.

We do not consider binding as a matter of law the two-hour overtime policy implemented by the Newburgh police department. While the Eighth Circuit in *Rudolph* applied 29 C.F.R. § 785.23 (1997), which provides that in light of the difficulty of calculating the precise number of hours an employee works at home, "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted," that regulation has no application to this case. No evidence suggests that plaintiff or any K-9 officer was involved in deciding that two hours of overtime was sufficient to care for a dog. Rather, the directive appears to have been unilaterally imposed by defendants. Further, we are loathe to characterize the policy as "reasonable," in view of Chief Kehoe's testimony that up to one hour a day, exclusive of training, could be expended on dog care activities.

Yet while 29 C.F.R. § 785.23 bears no role in this case, we pause to note that this regulation would be a useful tool by which police departments and their K-9 officers could avoid the very problems at issue here. As we have stated, the underlying concern about situations like those involving Officer Holzapfel is the difficulty an employer encounters in monitoring the number of off-duty hours a K-9 officer will spend with his assigned dog. Over-zealous employees could cause unintended bankruptcies within police departments, and ultimately force municipalities to eliminate K-9 units—despite their valuable contributions to law enforcement—because of cost. Involving both employee and employer representatives in negotiations to decide how many off-duty hours will be compensated is a simple solution

benefitting all parties. K-9 officers will know precisely the extent of their responsibilities. Municipalities and their police departments can budget with relative accuracy, and minimize concern that they will be required to defend against an overtime claim involving thousands of dollars. Equally important, citizens will continue to receive the services of a K-9 unit. We see these joint agreements as the best solution to the overtime problem this case represents, and encourage their use.

Second Jury Question

Plaintiff suggests, in addition, that the jury was improperly instructed to consider whether he trained Officer Patricola's dog at the direction of defendants, or whether defendants knew and acquiesced in this training while plaintiff had a reasonable expectation that he would be compensated for such work. As we made clear in our discussion regarding the first jury question, Officer Holzapfel is entitled to compensation for all activities that constitute "work." Consequently, with regard to Holzapfel's training this other dog, the jury should have been instructed to answer the kinds of questions we set forth in Part III B. of this opinion. The district court's use of the phrases "at the direction of" and "knowledge and acquiescence" are insufficient substitutes for the concepts embodied in the FLSA.

Such error will result in a new trial however, only if plaintiff was prejudiced by the instructions. Yet in our review of the relevant evidence, we do not see how a jury could find that Officer Holzapfel's time with Officer Patricola's dog qualifies as "work." Instead of Chief Kehoe "controlling" or "requiring" this additional training, plaintiff appears to have taken all the initiative.

It was Officer Holzapfel who approached the Chief to ask if he could be assigned to work with Officer Patricola's dog. The Chief did not authorize the assignment because he could not pay plaintiff, although he did say that plaintiff could choose to train the dog on his own time. Officer Holzapfel then made all of the necessary arrangements to switch his shifts—the police department did not schedule his hours so that he could attend the Sheriff's Department training class. Further, no evidence was submitted to the jury to indicate that plaintiff's job or relationship with the police department was made contingent upon his performing this extra training.

Without any evidence to suggest that taking Officer Patricola's dog to the class falls within the definition of "work," plaintiff could not expect a favorable verdict on this issue even if we were to remand it to the district court for a new trial. As such, while the failure to so instruct was error, it was harmless, and plaintiff was not prejudiced when the jury denied him recovery on this second claim.

Having determined that the verdict may be upheld on this basis, we need not reach the question whether the district court properly incorporated the concept of "expectation of compensation" into the second jury question. For even if that concept should have been excluded, plaintiff still has failed to establish in the first instance that his helping to train Officer Patricola's dog is compensable "work" for which he can recover overtime pay.

CONCLUSION

In short, what qualifies as compensable work under the FLSA is determined by whether the employee's activity is controlled or required by the employer, is necessarily and primarily for the benefit of the employer, and is an integral and indispensable part of the job. A "reasonableness" stan-

dard is inappropriate in deciding how many overtime hours for which a K-9 officer should be compensated.

Accordingly, we reverse the judgment of the district court with respect to the first jury verdict question, and remand for a new trial to decide whether Officer Holzapfel worked unpaid overtime hours with his assigned dog. With respect to the second jury verdict question, even though the district court erred in its instruction, such error was harmless. We therefore affirm the jury's verdict that plaintiff is not entitled to wages for his time spent training another officer's dog.

Having considered plaintiff's other arguments and finding them to be without merit, we affirm in part, reverse in part, and remand for a new trial.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 15, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 10409 (WCC)

JOSEPH H. HOLZAPFEL, and Others Similarly Situated,

Plaintiffs,

- against -

TOWN OF NEWBURGH, NEW YORK, AND CHARLES M. KEHOE, CHIEF OF POLICE, TOWN OF NEWBURGH POLICE DEPARTMENT,

Defendants.

OPINION AND ORDER

APPEARANCES:

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Appendix B

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CONNER, Senior D.J.:

Following a jury trial resulting in a verdict in favor of defendants Town of Newburgh and Charles M. Kehoe, plaintiff Joseph Holzapfel moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and for a new trial pursuant to Fed. R. Civ. P. 59. For the reasons set forth below, plaintiff's motions are denied.

I. BACKGROUND

Plaintiff has been a police officer in the Town of Newburgh Police Department since September 1990. Approximately one year after joining the police force, plaintiff was selected to be a police dog ("K-9") handler and was assigned a German Shepherd named Bandit. Under the Town of Newburgh's Standard Operating Procedures, each K-9 officer keeps his police dog at his home. The Town of Newburgh (the "Town") pays for the dog's food, for any necessary equipment, and for veterinary care. The officer is responsible for feeding, grooming, exercising, and training the dog. In addition, the officer must provide the dog with suitable shelter, ensure that the dog receives appropriate veterinary care, and take every

reasonable precaution to maintain a high standard of health for the dog. The officer is also required to maintain the cleanliness of the patrol vehicle to which the officer and dog are assigned.

On December 11, 1995, plaintiff filed this suit against the Town and Charles Kehoe, the chief of police for the Town of Newburgh Police Department. Plaintiff alleges that defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to compensate him adequately for "off-the-clock" activities that he performed as a police dog handler and assistant trainer. Prior to May 9, 1995, when an injury rendered plaintiff unable to perform his patrol duties, plaintiff worked approximately forty-hours per week and received two hours per week of overtime pay for his efforts in tending to Bandit during off-duty hours. Plaintiff, however, asserts that he is entitled to approximately forty three hours per week of additional overtime pay for time that he claims to have expended on Bandit since 1992. In addition, plaintiff, who is certified as an assistant trainer of police dogs, alleges that between April 1995 and May 9, 1995, he and Anthony Patricola, another Town police officer who had been assigned to be a K-9 officer and whose dog was in training during that time, attended numerous training sessions run by the Orange County Sheriff's Department. The Town of Newburgh did not have its own training program and had contracted with the Orange County Sheriff's Department to provide training for Officer Patricola's dog. Plaintiff claims that he assisted in training officer Patricola's dog at these sessions in addition to completing his regular forty hours per week of patrol work and caring for Bandit while off duty. Therefore, according to plaintiff, he is entitled to overtime compensation for his efforts with regard to officer Patricola's dog.

Appendix B

This court conducted a jury trial in September 1996. The case was submitted to the jury on special verdict questions. The questions, with the jury's answers, are as follows:

1. Has the plaintiff Joseph H. Holzapfel proved by a preponderance of the credible evidence that he spent additional time, over and above the 40 hours of regular time plus 2 hours of overtime per week for which he was compensated, in performing work which was (1) reasonably necessary to his duties of feeding, grooming, caring for and training the K-9 unit dog assigned to him and (2) which could not reasonably be performed within such 42 hours of compensated time per week?

Yes__ No X

2. Has plaintiff proved by a preponderance of the credible evidence that he performed additional work in training the K-9 unit dog assigned to Police Officer Anthony Patricola at the direction of defendant Town of Newburgh Police Department or with their knowledge and acquiescence and with the reasonable expectation that he would be compensated for such work?

Yes__ No X

(If your answer to both Question 1 and Question 2 is "No," you need answer no other questions.)

3. If your answer to either Question 1 or Question 2 is "yes," how many hours of such additional work

do you find that plaintiff performed during the following periods:[1]

December 1992 - December 1993 __ hours
December 1993 - May 1995 __ hours

4. Has plaintiff proved by a preponderance of the credible evidence that defendant Town of Newburgh Police Department either deliberately or with reckless disregard of its obligations, failed to pay plaintiff compensation to which he was entitled for work performed during the period from December 1992 to December 1993?

Yes__ No__

In light of the jury's answers to the special verdict questions, the court dismissed plaintiff's complaint.

II. ANALYSIS

On the instant motion, plaintiff seeks two types of relief: judgment as a matter of law pursuant to Rule 50 and a new trial pursuant, to Rule 59.[2]

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1. Under the statute of limitations provision contained in the FLSA, a plaintiff may recover back pay for a period of either two or three years prior to the date on which the employee filed his or her action, *i.e.*, December 11, 1995. The longer period is applicable only if the plaintiff establishes that the defendant wilfully violated the FLSA. 29 U.S.C.A. § 255(a).

2. Plaintiff's original Memorandum of Law lacked citations to the Record for statements that plaintiff asserted were made by various witnesses at trial. At the court's direction, the plaintiff subsequently submitted a Supplemental Memorandum to remedy this omission, and the defendants submitted a letter brief in response.

Appendix B

A. *Plaintiff's Motion for Judgment as a Matter of Law*

Rule 50(a) authorizes entry of judgment as a matter of law "only if', 'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.' " *Caruso v. Forslund*, 47 F.3d 27, 32 (2d Cir. 1995) (quoting *Stubbs v. Dudley*, 849 F. 2d 83, 85 (2d Cir.), *cert. denied*, 489 U.S. 1034 (1989)). Rule 50(b) further provides, however, that a motion for judgment must be "made at the close of all the evidence . . . ." In interpreting this provision, the Second circuit has held that "judgment as a matter of law is limited to those issues 'specifically raised in [a] prior motion for a directed verdict.' " *Cruz v. Local Union No. 3 of IBEW*, 34 F.3d 1148, 1155 (2d Cir. 1994) (quoting *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993)) . "The rule is well established that a motion for directed verdict at the close of all the evidence is a prerequisite [for judgment as a matter of law]." *Hilford Chemical Corp. v. Ricoh Electronics, Inc.*, 875 F.2d 32, 37 (2d Cir. 1989). "Moreover, this procedural requirement may not be waived as a mere technicality." *Cruz*, 34 F.2d at 1155 (citing *Redd v. City of Phenix City, Ala.*, 934 F.2d 1211, 1214 (13th Cir. 1991)).

In this case, plaintiff failed to move for judgment as a matter of law at the close of the evidence on the grounds he currently asserts. Indeed, he failed to make such a motion on any ground. Thus, because of his procedural default, plaintiff now is precluded from asserting that he is entitled to judgment as a matter of law.[3]

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3. Although a party's motion for judgment as a matter of law is procedurally inadequate, relief is nonetheless available to prevent

(Cont'd)

Appendix B

B. *Plaintiff's Motion for a New Trial*

Plaintiff contends that the jury's conclusions in this case should be set aside because the substance of the court's special verdict questions and accompanying instructions to the jury constituted legal error and because the jury's findings were against the weight of the evidence. Plaintiff's motion for a new trial under Rule 59, unlike his motion for judgment as a matter of law, is not procedurally barred.[4] Moreover, a less stringent standard applies to a motion for a new trial than to a motion for judgment as a matter of law. *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987). "The district court's

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(Cont'd)
manifest injustice. "If the evidence was insufficient but no motion for directed verdict was made, the court could grant a new trial if it were satisfied that justice so required." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 362 (2d Cir.), *cert. denied*, 508 U.S. 952 (1993). However, in such a case, although the court may set the verdict aside, it would be inappropriate for the court to enter judgment in the moving party's favor unless, because of a dispositive issue of law, a new trial could not result in a verdict favoring the non-moving party. *See Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir. 1986) (stating that judgment in favor of the moving party would be appropriate "when, for example, the (moving party) has immunity from a claim for the type of damages sought"). Here, plaintiff has not established that judgment as a matter of law is warranted.

4. Plaintiff raised his objections to the jury instructions and the substance of the verdict questions both prior to and following submission of the instructions and questions to the jury. With regard to plaintiff's insufficiency of the evidence claim, Rule 59 does not make a motion for judgment as a matter of law a precondition to a motion for a new trial. *Russo v. New York*, 672 F.2d 1014, 1021-21 (2d Cir. 1982), *modified*, 721 F.2d 410 (2d Cir. 1983); 6A James Wm. Moore et al., Moore's Federal Practice ¶ 59.04[5] (2d ed. 1996).

grant of a new trial motion is usually warranted only if it 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 875 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). Unlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence to support the jury's verdict. *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992). In evaluating a motion for a new trial, the court "is free to weigh the evidence . . . and need not view it in the light most favorable to the verdict winner." *Id.* (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978)).

1. The First Special Verdict Question

Plaintiff argues that he is entitled to a new trial because the court improperly framed the issues presented in the first special verdict question. In plaintiff's view, the first question suffered from three serious flaws. In addition, plaintiff asserts that even if the first verdict question was properly phrased, a new trial on that question is justified because the jury's conclusion was against the weight of the evidence.

a. The Requirement that Plaintiff's Off-Duty Activities Must Have Been "Reasonably Necessary" In Order to be Compensable

According to plaintiff, the first verdict question erroneously saddled him with the burden of proving that the overtime work he claims to have performed was reasonably necessary. Plaintiff argues that under pertinent federal employment law jurisprudence there is no requirement that work suffered or

permitted by an employer must be reasonably necessary before the employer is obligated to compensate the employee for his or her efforts. According to plaintiff, any amount of time, no matter how lengthy, that a K-9 officer spends on off-duty, dog-care activities should be compensable work time.

We disagree. Employees are entitled to compensation only for "work." *Reich v. New York City Transit Authority*, 45 F.3d 646, 651 (2d Cir. 1995). It is well settled that an activity constitutes "work," and is compensable under the FLSA, if it involves "physical or mental exertion (whether burdensome or not)," or the loss of an employee's time, that is "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1949)).

In addition, the Portal-to-Portal Act, which amended the FLSA in 1947, states that

> no employer shall be subject to any liability . . . on account of the failure of such employer to pay an employee . . . [for] activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C.A. § 254(a). The FLSA requires an employer to compensate its employee for the "activities performed either before or after the regular shift . . . if those activities are an

integral and indispensable part of the principal activities for which covered [employees] are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). It is determinative whether the activity at issue is "necessary to the business and is performed by the employees, primarily for the benefit of the employer." *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

Several courts have found, as a general matter, that time spent by a police officer caring for or training his or her assigned police dog during that officer's off-duty hours constitutes compensable work time. *See Andrews v. DuBois*, 888 F. Supp. 21.3, 216-17 (D.Mass. 1995); *Levering v. District of Columbia*, 869 F. Supp. 24, 26-27 (D.D.C. 1994); *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277-79 (E.D. Va. 1992); *see also Reich*, 45 F.3d at 650 (dicta). This is so because feeding, training, exercising, and otherwise ministering to the needs of a K-9 unit dog is, at least up to a point, "indispensable to the dog['s] well-being and to the employer's use of the dog[ ] in its business." *Reich*, 45 F.3d at 650. As the court in *Nichols v. Chicago*, 789 F. Supp. 1438, 1442 (N.D. Ill. 1992), observed, "in order for the canine patrol officer to properly perform his or her principal activity of canine patrol, the canine portion of the work team must be in proper working order."

Because a basic level of care and attention is essential to ensure a police dog's health and well-being, some off-duty efforts on the part of a K-9 officer to maintain his or her dog clearly amount to "work." However, it does not follow that all off-duty, dog-related activities, no matter how grossly excessive, are sufficiently related to the K-9 officer's principal responsibilities or beneficial to that officer's dog as to warrant overtime compensation. In short, if a K-9 officer's specific exertions, even though of a type that would generally be

compensable, exceed reasonable limits, they cannot be considered integral and necessary and therefore do not constitute work.

The issue of whether a K-9 officer is entitled to payment for all of his or her time spent in off-duty, dog-care activities, or whether the employee must first demonstrate that such efforts were reasonably necessary, has not been squarely addressed by the courts.[5] However, outside the canine context, at least two courts have concluded that in order to be compensable, the amount of overtime an employee claims to have spent on efforts related to the employee's principal activities must be reasonable. In *Amos v. United States,* 13 Cl. Ct. 442 (Cl. Ct. 1987), the court found that cook foremen at two federal correctional institutions were entitled to overtime compensation for pre- and post-shift time spent in the prisons' control rooms and in traveling to and from those control rooms to work areas. According to the court, this time became an integral part of the performance of the foremen's duties because prison procedure required the foremen to travel to the control rooms to obtain keys, radios, and other necessary equipment. Nonetheless, the court observed:

> Plaintiffs are not necessarily entitled to payment for all the time they each spent in the control room but only for that amount of time *reasonably required,*

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5. We note that in *Levering,* 869 F. Supp. at 26, the court stated that the plaintiffs were entitled to compensation under the FLSA for "the actual time spent exercising, feeding, and otherwise caring for the canine detachment dogs." However, in *Levering,* the defendant did not contend that the thirty minutes per day that plaintiff claimed he spent caring for his police dog was unreasonable, and thus, the court had no need to reach the issue presented in the present case.

> after gaining possession of the keys and other items, to leave the control room and upon completion of the shift to reenter the control room and return these items. In addition, plaintiffs are entitled to payment for that amount of time *reasonably required,* upon leaving the control room, to walk to and return from the food service area given the actual distance involved over the best routes available to them at these two facilities. To rule otherwise would run the risk of rewarding plaintiffs for lack of diligence in getting and returning the equipment and in walking to and from this work station.

Id. at 449 (emphasis added).

Similarly, in *Reich v. IBP, Inc.* 820 F. Supp. 1315, 1324, (D. Kan. 1993), *aff'd and remanded,* 38 F. 3d 1123 (10th Cir. 1994), the court determined that time spent by meat processing workers putting on certain protective gear and waiting in a "knife room" for their knives to be sharpened was compensable because these activities were integral and indispensable to the safe performance of the workers' occupation. However, citing *Amos,* the court stated that "[e]mployees are entitled compensation for the reasonable time (rather than the actual time) required to put on personal protective gear and obtain sharpened knives." *Id.* at 1328-29. On appeal, the Tenth Circuit agreed that reasonable time was an appropriate measure for determining compensation and affirmed that aspect of the district court's decision. *Reich v. IBP, Inc.,* 38 F.3d 1123, 1127 (10th Cir. 1994).

Donovan v. United States, 92 Lab. Cas. (CCH) 34,124 (D.DC. 1981), a district court decision from the District of

Columbia, upon which plaintiff principally relies, is not to the contrary. In *Donovan,* the Secretary of Labor and employees of the United States Postal Service ("USPS") brought suit against the USPS seeking overtime compensation for the time the employees spent training and studying for various proficiency and advancement examinations. The USPS contended that the employees' activities were preliminary to their principal activity of distributing mail and therefore were not compensable under the FLSA. In the alternative, the USPS argued that even if the employees' activities did constitute work, the USPS had already paid for a reasonable amount of employee-study time. According to the USPS, the employees were not entitled to payment because only a de minimis number of employees had studied for periods in excess of the time allotted and, in addition, public policy considerations justified the time periods deemed by the USPS to be reasonable. However, USPS did not argue that any specific employees spent more time studying than was required for them to succeed on their examinations, and the court did not squarely address the issue of whether an employee's unnecessary, but work-related activities, are compensable.[6] Thus, the holding in *Donovan* has little bearing on the instant matter in which the issue is whether the plaintiff's specific off-duty, dog-care efforts, which fell within the category of potentially compensable activities, were, in fact, sufficiently integral to the performance of his duties as to warrant compensation. To the extent that *Donovan* may be read to support the proposition that an employee's claim for off-duty time is compensable, even if that time is not reasonably

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6. The Supreme Court's decision in *Mitchell v. King Packing Co.,* 350 U.S. 260 (1956), is similarly inapposite. Although the Court ruled that the time spent by butchers in sharpening their knives was integral and indispensable to their jobs, there was no contention that the time spent was unreasonably excessive.

required for the actual performance of his or her duties, we find *Donovan* unpersuasive.[7]

Plaintiff also contends that the first verdict question improperly ceded to the jury the court's obligation to determine what constitutes work within the meaning of the FLSA. Whether an activity is sufficiently related to a plaintiff's principal activity as to be compensable under the FLSA is often described as a question of fact. *See Nichols,* 789 F. Supp. at 1441 (citing cases). However, the question of whether a certain activity constitutes work has also been characterized as a question of law. *See Berry v. County of Sonoma,* 30 F. 3d 1174, 1180 (9th Cir.), *cert. denied,* 115 S. Ct. 1100 (1995); *Birdwell v. City of Gadsden, Ala.,* 970 F.2d 802, 807-08 (11th Cir. 1992); *Andrews,* 888 F. Supp. at 215. In dictum, the Supreme Court described this issue as a mixed question of fact and law. *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 743, 101 S. Ct. 1437, 1446, 67 L. Ed.2d 641 (1981) ("FLSA claims typically involve complex

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7. Plaintiff's reliance on *Donovan v. Kentwood Development Co., Inc.,* 549 F. Supp. 480 (D. Md. 1982), is also misplaced. In *Kentwood Development,* the court addressed the defendants' argument that a real estate salesman/assistant-resident manager at defendant's property was not entitled to backpay and overtime for the 75 hours per week he claimed to have worked. According to the defendant, it was unnecessary for the plaintiff to work the hours he claimed because "there were other people available to cover the office at all times." *Id.* at 488 (quoting trial transcript). The court rejected this contention and found that "[i]t is immaterial whether it was necessary for [the employee] to work long hours . . . ." *Id.* However, the issue in *Kentwood Development* was not whether the activities in which the employee was engaged were necessary and of benefit to the employer, as in the present case, but whether the employee was entitled to compensation for time he spent doing work that could have been performed by other employees. Thus, we do not find *Kentwood Development* to be on point.

mixed questions of fact and law — *e.g.*, what constitutes the 'regular rate,' the 'workweek,' or 'principal' rather than 'preliminary or postliminary' activities."), Thus, we concur with the court's determination in *Graham v. City of Chicago,* 828 F. Supp. 576, 582 (N.D. Ill. 1993.) that the question is most aptly treated as a mixed question of law and fact. To be more precise, the nature of the plaintiff's activities and their relation to plaintiff's job are questions of fact while application of the FLSA to those activities is a question of law.

Consistent with this view and mindful of the guidance provided by *Reich v. New York City Transit Authority,* we concluded in an earlier decision in this case that Bandit's care and training were the type of necessary and indispensable activities for which plaintiff could be entitled to compensation under the FLSA. *Holzapfel v. Town of Newburgh, New York,* 935 F. Supp. 418, 422 (S.D.N.Y. 1996). However, whether and to what extent plaintiff's off-duty dog-care activities were reasonably necessary was an issue that the parties disputed and was properly left to the jury to resolve based on the evidence presented.

b. The Requirement that Plaintiff Establish that He Could Not Reasonably Have Performed His Off-Duty Activities Within the Time for Which He Was Compensated

According to plaintiff, the second element of the first question unfairly required him to establish that he could not, within the forty-two hours per week authorized by the Town of Newburgh Police Department, reasonably have completed the work for which he sought additional overtime compensation. As plaintiff observes, the regulations caution that work which

an employer suffers or permits an employee to engage in outside of normal hours is compensable. 29 C.F.R. § 785.11. An employer is not free to refuse to pay overtime on the ground that the employee could have completed the work during regular hours and thus need not have resorted to working overtime. *Id.; see Reich v. Department of Cons. & Natural Resources*, 28 F.3d 1076, 1182 (11th Cir. 1994) ("The reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted."). However, with respect to work performed away from the job site or at home, the employer must credit an employee's claim for hours worked only "if the employer knows or has reason to believe that work is being performed." 29 C.F.R. § 785.12; *see Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). This element of actual or constructive knowledge is particularly significant in cases in which the employee acts so as to prevent his or her employer from acquiring knowledge of the alleged uncompensated overtime hours. *See Forrester*, 646 F.2d at 414-15.

In the instant matter, plaintiff regularly submitted time sheets indicating that he worked two hours of overtime per week during the period for which he seeks additional compensation. Moreover, plaintiff does not assert that any of his supervisors coerced him into underreporting his time. Thus, plaintiff does not appear to contend that the police department had actual knowledge of his purported overtime work beyond the two hours per week he claimed. *See* Plaintiff's Supplemental Memorandum of Dec. 24, 1995, at 11 (stating "[t]he Chief had no idea as to the actual time it took officer Holzapfel to perform his various K-9 duties (page 96 [of Sept. 4, 1996, Trial Transcript])").

However, even in the absence of time sheets or other documentation apprising the Town that plaintiff worked the overtime he now claims, the defendants' constructive knowledge might be imputed from evidence demonstrating the police department's awareness that plaintiff's canine responsibilities were so extensive that he could not have completed them during his regular shift and the two hours per week of overtime the Town allotted. In *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995), for example, the court of appeals indicated that had the evidence clearly established the chief of police's awareness of the plaintiff police officer's need to work overtime in order to meet the demands of the plaintiff's undercover assignment, knowledge of plaintiff's off duty efforts could justifiably have been attributed to the police department. Consistent with that logic, this court instructed the jury:

> Plaintiff is entitled to compensation for such additional work if and only if it was performed either at the direction of the employer or if the employer actually knew or reasonably should have known that work was being performed and condoned or acquiesced in its performance. The plaintiff need not show that the defendant expressly authorized the off hours work beyond the two hours per week for which he was compensated. Instead, it will suffice for the plaintiff merely to show that he was assigned duties which could not reasonably be performed during normal working hours or during the two hours of over-time per week for which he was paid.

Trial Transcript of Sept. 5, 1996 at 11. Thus, the court is satisfied that it was proper to include in the first verdict question

the condition that plaintiff demonstrate that the time he spent in excess of forty-two hours per week could not reasonably have been performed within the time allotted by the Town of Newburgh Police Department. Because of the absence of any other probative evidence of defendants' actual knowledge, such a showing by plaintiff was necessary in order to establish a legitimate basis upon which to impute to the defendants the requisite constructive knowledge of plaintiff's overtime work.

Plaintiff argues that "an employer has a 'duty to inquire' and an employee's failure to report hours worked is no defense in an FLSA case." Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Judgment as a Matter of Law and for a New Trial, dated Sept. 11, 1996, at 6 ("Plaintiff's Memorandum"). In support of this contention, plaintiff relies on *Reich v. Department of Cons. & Natural Resources*, 28 F.3d 1076 (11th Cir. 1994), in which the appellate court recognized that "an employer's knowledge is measured in accordance with his 'duty . . . to inquire into the conditions prevailing in his business.' " *Id.* at 1082 (quoting *Gulf King Shrimp Co. v. Wirtz*, 407 F. 2d 508, 512 (5th Cir. 1969)). The court further observed that "[i]n reviewing the extent of an employer's awareness, a court 'need only inquire whether the circumstances . . . were such that the employer either had knowledge of overtime hours being worked or else had the opportunity through reasonable diligence to acquire knowledge.' " *Id.* (quoting *People ex rel. Price v. Sheffield Farms-Slawson-Decker*, 121 N.E. 474, 476 (1918)).

In *Reich*, the Secretary of Labor brought an action against the State Department of Conservation and Natural Resources (the "Department") alleging infractions of the FLSA's overtime and record-keeping provisions. The court of appeals reversed the trial court's conclusion that, although the Secretary proved

a pattern of uncompensated overtime work by officers of the Department during the 1987 through 1990 deer hunting seasons, the Department was not accountable because it had no actual or constructive knowledge of the overtime hours and had issued a policy prohibiting overtime. The court of appeals found that the Department, in fact, had actual knowledge of the officers' overtime work through a 1987 study which disclosed that unreported overtime during deer hunting season was a substantial problem despite the Department's written policy prohibiting all such work.

In addition, the court of appeals agreed with the district court that weekly arrest reports, which revealed that certain officers were not reporting the total number of hours they actually worked during several hunting seasons, were sufficient to alert mid-level supervisory personnel that those officers were working overtime. However, the court of appeals ruled that the district court erred in failing to impute knowledge of the arrest reports' inconsistencies to the Department. Thus, the court of appeals concluded that the Department, alerted by the 1987 report and the inconsistencies between certain officers' time sheets and arrest reports, could have acquired actual knowledge of the overtime problem through the exercise of reasonable diligence.

The uncontested facts of the instant case are markedly dissimilar to those in *Reich v. Department of Cons. & Natural Resources.* Here, plaintiff did not offer evidence that could reasonably have alerted the police department to the possibility that he was working overtime. A far more apposite case is *Newton,* in which the plaintiff, a police officer, sought compensation for unauthorized overtime that he allegedly accumulated while temporarily serving as an undercover drug task force officer with the United States Drug Enforcement

Agency. In reversing the district court's finding that the police department had constructive knowledge of the plaintiff's overtime, the appellate court observed that the plaintiff had disregarded the police department's overtime procedures. The court of appeals stated:

> If we were to hold that the City had constructive knowledge that (plaintiff) was working overtime because [the chief of police] had the ability to investigate whether or not (plaintiff) was truthfully filling out the City's payroll forms, we would essentially be stating that the City did not have the right to require an employee to adhere to its procedures for claiming overtime. The fact that the (chief of police) had access to the Task Force's activities means that perhaps he could have known that (plaintiff) was working overtime hours, but the question here is whether he should have known. In light of the fact that (the chief of police) explicitly ordered (plaintiff) not to work overtime and in light of the fact that (plaintiff) admits that he never demanded payment for overtime already worked, it is clear that access to information regarding the Task Force's activities, standing alone, is insufficient to support the conclusion that the City should have known that [plaintiff] was working overtime.

Newton, 47 F.3d at 749.[8]

8. Also relevant to the issue of the Town's knowledge of plaintiff's alleged overtime is *Forrester* in which the appellate court affirmed the district court's grant of summary judgment for the employer because the employee turned in time sheets which did not include overtime hours, and the employee did not demonstrate that the employer should have known that the employee worked more hours than those claimed on his time sheets. *Forrester*, 646 F.2d at 414.

C. Plaintiff's Claim that the First Verdict Question was Ambiguous

In plaintiff's view, the first verdict question was improper because it gave the jurors the misimpression that in order for them to find in plaintiff's favor, plaintiff must have established that he "necessarily spent more than 42 hours a week (his entire shift plus two hours) doing K-9 work . . . ." Plaintiff's Memorandum at 12. We find this contention to be without merit.

First, we note that although plaintiff had ample opportunity to object to the challenged question as ambiguous before the jury began its deliberations, plaintiff failed to do so with any specificity. *See Bohack Corp. v. Iowa Beef Processors Inc.*, 715 F.2d 703, 73.0 n.8 (2d Cir. 1983). Moreover, the second part of the first question permits the jury to find for plaintiff if the jury is satisfied that his alleged overtime work "could not reasonably be performed within . . . 42 hours of compensated time per week." Given the presence of the term "reasonably" in the clause at issue, plaintiff's assertion that the question is ambiguous is unpersuasive. It would not be reasonable to expect plaintiff to devote his entire work week as a police officer exclusively to caring for his K-9 unit dog. Thus, there is no colorable basis for plaintiff's claim that the jury could have misconstrued the first question as requiring him to demonstrate that, even had he allocated all of his on-duty time to dog care, he would also have needed to expend the additional hours for which he seeks compensation.

d. Plaintiff's Contention that the Jury's Answer was Against the Weight of the Evidence

Plaintiff argues that he is entitled to a new trial because the weight of the evidence does not support the jury's conclusion

that he did not spend any uncompensated off-duty time engaged in necessary dog-care activities that he could not reasonably have performed during the time that the Newburgh Police Department allotted him. In plaintiff's view, "[t]here can be no question that, based on plaintiff's testimony, he spent more than two hours a week devoted to activities such as feeding and walking the dog, cleaning the kennel at home and at work, and cleaning his personal car and his assigned police car that fit the conditions set in the verdict question." Plaintiff's Memorandum at 16.

We find nothing erroneous in the jury's decision to reject plaintiff's claims completely. The jury's resolution of the issues presented by the first verdict question depended principally upon an evaluation of the plaintiff's credibility. As the trier of fact, the jury's credibility assessments are entitled to deference, *Wade v. Orange County Sheriff's Office*, 844 F. 2d 951, 955 (2d Cir. 1988) , and this court discerns no persuasive reason to disregard the jury's assessments in this matter.

The unconvincing nature of plaintiff's testimony in support of his preposterous contention that he expended approximately forty-three hours of off-duty time caring for his K-9 unit dog every week for several years certainly provided a fair basis upon which the jury could have concluded that the plaintiff's claims were not to be believed. When added to plaintiff's paid working time of forty-two hours per week, his claimed forty-three hours of additional overtime would make a total of eighty-five hours per week, or an average of more than twelve hours per day, seven days a week. This, of course, would have left the plaintiff with very little waking time to eat, tend to his personal hygiene, perform household chores, engage in leisure activities or fulfill his responsibilities as a husband and father.

Thus, the jury may well have concluded that plaintiff's claims regarding the off-duty time he spent caring for Bandit were so grossly exaggerated that his entire testimony was unreliable. Because plaintiff offered little beyond his own self-serving statements in support of his overtime claims, we are satisfied that the jury's finding that plaintiff spent no compensable overtime caring for Bandit was not against the clear weight of the evidence.[9]

2. The Second Special Verdict Question

Plaintiff contends that the second verdict question improperly imposed upon him the burden of proving either (1) that the Town of Newburgh Police Department affirmatively directed him to train Officer Patricola's K-9 unit dog or (2) that the police department acquiesced to his actions and that he reasonably expected to be compensated for his efforts. According to plaintiff, an employee need not harbor any expectation of compensation at the time the employee engages in overtime work in order for that employee to be due payment for his or her labors. In plaintiff's view, if the employer suffers or permits the employee to engage in work, the employer must compensate the employee.

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9. At trial, Defendant Kehoe acknowledged that a K-9 officer could reasonably spend between fifteen and thirty minutes, per day feeding a K-9 unit dog and cleaning its kennel and exercise area. However, contrary to plaintiff's assertions, Defendant Kehoe's statements are hardly sufficient to establish that plaintiff, in fact, spent the tremendous amount of time plaintiff claims or that, in performing his necessary duties, he spent any time at all beyond the forty-two hours for which he was compensated.

Appendix B

Plaintiff's entitlement to compensation from defendants depends upon whether the employment relationship between plaintiff and the Town, and therefore coverage under FLSA, extends to the hours plaintiff claims to have spent training Officer Patricola's dog during sessions run by the Orange County Sheriff's Department.[10] The language of the FLSA provides little guidance as to the parameters of the employer-employee relationship. *See Reich v. New York City Transit Authority*, 45 F.3d at 648. However, in *Tennessee Coal. Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S. Ct. 698, 703, 88 L. Ed. 949 (1944), the Court explained that the FLSA applies to "physical or mental exertion (whether

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10. The FLSA, as amended in 1985, states that the term "employee" does not include any individual who volunteers to perform services for a public agency if "the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered" and "such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C.A. § 203 (e) (4). Additionally, the Administrator of the Wage and Hour Division of the Department of Labor has interpreted this section of the FLSA thus: "An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours." 29 C.F.R. § 553.101(a). According to the Administrator, "[a]n individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer." 29 C. F. R. § 553.101 (b) . In the instant case, the issue was not whether plaintiff was acting as a volunteer for either the Orange County Sheriff's Department or the Town of Newburgh Police Department. Rather, the issue was whether plaintiff's activities were within the scope of his employment relationship with the Town of Newburgh.

burdensome or riot) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." In addition, the FLSA defines "employ" as including "to suffer or permit to work." 29 U.S.C.A. § 203(g). Although, it is true that even if an employee performs work voluntarily, he or she is still entitled to compensation, *see Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 302, 105 S. Ct. 1953 (1985); 29 C.F.R. § 785.11, it is far from clear that plaintiff was under the employ of the Newburgh Police Department when he attended the training sessions at issue.

According to the Supreme Court: "The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Walling v. Portland Terminal Co.,* 330 U.S. 148, 152, 67 S. Ct. 639, 642 (1947) An individual who, "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is beyond the FLSA's ambit. *Id.* Clearly some expectation of compensation on the part of an individual for the particular activities at issue, even if that compensation takes the form of in-kind benefits, is a prerequisite to employee status. *See Tony and Susan Alamo Foundation,* 471 U.S. at 301 (finding, in part, that religious foundation's "associates," who received food and shelter in exchange for their efforts on behalf of the foundation, are employees within the meaning of the FLSA because they worked in contemplation of compensation); *Secretary of Labor v. ConAgra, Inc.,* 784 F. Supp. 1394, 1400 n.6 (S.D. Iowa 1992) (stating that "the fact that the participants decide to participate in the program knowing that they will ultimately get to keep

the item produced indicates that there is a 'contemplation of compensation' "), *rev'd on other rounds,* 987 F.2d 1357 (8th Cir. 1993). Thus, it was not error for the jury to consider whether plaintiff reasonably expected to be compensated by the Town of Newburgh for his assistance in training officer Patricola's dog. This is particularly true given plaintiff's failure to demonstrate that the Town of Newburgh Police Department controlled plaintiff's activities at the training classes or that the Town, rather than the Orange County Sheriff's Department, was the primary beneficiary of plaintiff's participation in those classes.

III. CONCLUSION

For the foregoing reasons, plaintiff's motions for judgment as a matter of law and for a new trial are denied.

SO ORDERED.

Date: January 15, 1997
White Plains, New York

s/ [illegible]
Senior United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 11, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95CV 10409 (WCC)

Joseph H. Holzapfel, and others similarly situated,

Plaintiff

-against-

Town of Newburgh, New York, and Charles M. Kehoe, Chief of Police Town of Newburgh Police Department,

Defendants.

JUDGMENT

The issues in the above entitled action having been brought on for trial before the Honorable William C. Conner, United States, District Judge with a jury on September 5, 1996, and at the conclusion of the trial, the jury having answered the attached special verdict form, and the jury in so doing having returned a verdict in favor of the defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: White Plains, N.Y.
September 11, 1996

Appendix C

APPROVED:

s/ William C. Caine
U.S.D.J.

s/ James M. Parkison
Clerk

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED AUGUST 1, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 10409 (WCC)

JOSEPH H. HOLZAPFEL, and Others Similarly Situated,

Plaintiffs,

against

TOWN OF NEWBURGH, New York, and CHARLES M. KEHOE, Chief of Police, Town of Newburgh Police Department,

Defendants.

OPINION AND ORDER

APPEARANCES:

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Appendix D

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DANIEL J. SCHNEIDER, ESQ.
Of Counsel

CONNER, Senior D.J.:

On December 11, 1995, plaintiff Joseph Holzapfel filed this action against defendants Town of Newburgh (the "Town") and Charles M. Kehoe, the Chief of Police for the Town of Newburgh Police Department. Plaintiff has alleged that defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to compensate him adequately for "off the clock" activities that he performed as a police dog handler and assistant trainer. Plaintiff has also asserted a *quantum meruit* claim under New York state law. Plaintiff has moved for summary judgment, pursuant to Fed. R. Civ. P. 56(c), on certain issues relating to his FLSA claim. For the reasons set forth below, plaintiff's motion is denied.

BACKGROUND

The following facts are undisputed, unless otherwise noted. Plaintiff became a police officer in the Town of Newburgh Police Department in September 1990. In September 1991, plaintiff was selected to be a police dog (K-9) handler and was assigned a German Shepherd named Bandit. Due to an injury that he sustained while trying to apprehend a suspect, plaintiff

has been on injury leave and unable to do patrol work since May 9, 1995. On or about January 1, 1996, the Town retired Bandit and sold him to plaintiff for one dollar.

Following plaintiff's selection as a K-9 handler, the Town sent plaintiff and Bandit to a fourteen-week training program at the Orange County Sheriff's K-9 training facility. Plaintiff was taught the basics of police K-9 work, including caring for his police dog, obedience training, agility training, tracking, criminal apprehension, searches for articles and building searches. Subsequently, in July 1994, Bandit was certified as being trained in narcotics detection. Plaintiff and defendants agree that, some ongoing training is necessary to maintain a police dog's skills. Under the Town's Standard Operating Procedures for police K-9 units, police dog handlers "are encouraged to work their dogs during their tour of duty, when time permits, in areas that they are weak in, or on special training needs as designated by the trainer or Sgt. in charge." Appendix D, at 4, attached to Plaintiff's Memorandum of Law. K-9 officers and police dogs also receive two days of training per month at the Orange County Sheriff's K-9 training facility.

Under the Town's Standard Operating Procedures, each K-9 officer keeps his police dog at his home. The Town pays for the dog's food, for any necessary equipment and for veterinary care. The officer is responsible for feeding the dog once a day, ensuring that the dog has fresh water, brushing the dog once a day, giving the dog its heartworm medicine, keeping its nails clipped, providing the dog with shelter, ensuring that the dog receives appropriate veterinary care and taking every reasonable precaution to maintain a high standard of health for the dog. The officer is also responsible for maintaining the cleanliness of the patrol vehicle to which the officer and dog are assigned.

Appendix D

Plaintiff has asserted that until May 9, 1995, his regularly scheduled shifts as a Town police officer totalled forty hours per week. During that time, plaintiff was paid for sixteen hours per month of training at the Orange County Sheriff's K-9 training facility. Plaintiff has asserted that prior to May 9, 1995, he spent the following amounts of off-duty time caring for and training Bandit:

Activity	*Time Per Day*	*Time Per Week*
Grooming and Bonding (daily)	60 min.	7 hrs.
Bathing, flea dipping, nail trimming	—	1 hr.
Exercising and walking (workday)	60 min.	5 hrs.
Exercising and walking (non-workday)	90-120 min.	3-4 hrs.
Cleaning kennel—home (daily)	45 min.	5 hrs. 15 min.
Cleaning kennel—work (workday)	15 min.	1 hr. 15 min.
Cleaning patrol vehicle (workday)	20 min.	1 hr. 40 min.
Cleaning personal vehicle (daily)	15 min.	1 hr. 45 min.

Appendix D

Feeding (daily)	25 min.	2 hrs. 55 min.
Training (daily) obedience, fetch	90 min.	10 hrs. 30 min.
Training (weekly)[1] (average)	45 min.	5 hrs 15 min.
TOTAL: (workday)	6 hrs. 15 min.	44 hrs. 35 min.
(non-workday)	6 hrs. 10-40 min.	to 45 hrs. 35 min.

Prior to May 9, 1995, plaintiff received two hours per week of overtime pay for caring for Bandit during his off-duty hours. Plaintiff asserts that he is entitled to overtime pay for the additional 42 1/2 to 43 1/2 off-duty hours per week that he allegedly worked.[2]

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1. Plaintiff has alleged that at least once per week, he trained Bandit in each of these skills: tracking, agility, aggression and criminal apprehension, building searches, box searches and searches for articles.

Plaintiff has also alleged that he trained Bandit in narcotics detection for two hours each week beginning in July 1994. Therefore, beginning in July 1994, the total number of hours per week that plaintiff has alleged that he worked increased by two hours and the daily total increased by an average of seventeen minutes.

2. Under the statute of limitations provision contained in the FLSA, plaintiff may recover back pay for a period of either two or three years prior to the date on which he filed this action, *i.e.*, December 11, 1995. The longer period is applicable only if plaintiff establishes that defendants willfully violated the FLSA. *See* 29 U.S.C. § 255(a). Plaintiff has alleged that defendants acted willfully but does not seek summary judgment on this issue.

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Plaintiff, who is certified as an assistant trainer of police dogs, has also alleged that between early April 1995 and May 9, 1995, he attended approximately 20 eight-hour training classes with Officer Patricola, a Town police officer who had been assigned to be a K-9 officer and whose dog was in basic training during that time. He has asserted that he performed this work in addition to his regular forty hours per week of patrol work and, presumably, in addition to the 44 1/2 to 45 1/2 off-duty hours per week that he allegedly spent caring for and training Bandit. Plaintiff has alleged that he received no compensation for the hours that he spent training Patricola's dog. Plaintiff contends that he is entitled to overtime compensation for those hours.

Plaintiff has alleged that between May 9, 1995, when he ceased to do patrol work, and January 1, 1996, when the Town retired Bandit, he continued to care for Bandit in his usual manner, although he no longer spent 20 minutes per day cleaning his assigned patrol car. Plaintiff asserts that he is entitled to be compensated for this work as well.. According to the complaint, however, these allegations relate to plaintiff's state law *quantum meruit* claim. *See* Complaint, at ¶¶ 20-25. Because plaintiff has not sought summary judgment on that claim, we will not consider these allegations at this time.

Plaintiff seeks partial summary judgment on his FLSA claim. He requests an order (1) declaring that he is entitled to be paid overtime for the off-duty hours that he spent caring for and training Bandit and training Patricola's police dog, (2) fixing the number of hours per week that plaintiff spent on each activity listed above and (3) declaring that plaintiff is entitled to liquidated damages.

Appendix D

DISCUSSION

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c) . A material fact is one that "might affect the outcome of the suit under the governing law . . . ." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. *See id.*, at 248-49. In order to defeat a motion for summary judgment, the nonmoving party must "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The burden on the nonmoving party is tempered, however, by the rule that "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

An activity constitutes "work," and is compensable under the FLSA, if it involves "physical or mental exertion (whether burdensome or not)," or the loss of an employee's time, that is "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Reich v. New York City Transit Authority*, 45 F.3d 646, 651 (2d Cir. 1995) (internal citations omitted). The FLSA requires an employer to compensate its employee for "activities performed either before or after the regular work shift . . . if those activities are an integral and indispensable part of the principal activities for which covered [employees] are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). An employer must pay its employee overtime "at a rate not less than one and one-half times the regular rate at which [the

employee] is employed" for hours worked in excess of forty hours per week.[3] 29 U.S. C. § 207(1) .

Turning first to plaintiff's claim for overtime compensation for the off-duty time that he spent caring for and training Bandit, we note that several courts have held, in deciding motions for summary judgment, that a police officer's care and training of his assigned police dog during his off-duty hours is an integral and indispensable part of his work activities. *See Treece v. City of Little Rock*, 923 F. Supp. 1122, 1125-26 (E.D. Ark. 1996); *Andrews v. DuBois*, 888 F. Supp. 213, 216-17 (D. Mass. 1995); *Levering v. District of Columbia*, 869 F. Supp. 24, 26-27 (D.D.C. 1994) ; *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277-79 (E.D. Va. 1992); *see also Reich*, 45 F.3d at 650 (*dicta*); *Nichols v. City of Chicago*, 789 F. Supp. 1438, 1442-43 (N.D. Ill. 1992) (denying employer's summary judgment motion). Therefore, a K-9 officer must be compensated for the off-duty time that he spends performing the tasks involved in caring for and training his assigned police dog, unless the time devoted to a particular task is *de minimis*. *See Reich*, 45 F.3d at 652-53. The issue, of course, then becomes the amount of time for which the police officer must be compensated.

Defendants do not dispute that they required plaintiff to perform some work caring for Bandit while he was off-duty and that he is entitled to compensation for that work. They argue, however, that summary judgment is inappropriate in this case because there are issues of fact that preclude us from

---

3. Overtime for law enforcement personnel may, under certain circumstances, be subject to a somewhat different method of calculation, *seq*. 29 U.S.C. § 207(k), but neither party contends that this provision applies in this case.

determining, as a matter of law, that plaintiff worked more than two hours per week while he was off-duty. We agree.

The amount of time for which a K-9 officer must be compensated for off-duty care and training of his assigned police dog is typically an issue of fact. *See Treece*, 923 F. Supp. at 1125; *Truslow*, 783 F. Supp. at 279. Plaintiff contends that this case is different, because the only available evidence concerning the amount of time that he spent caring for and training Bandit is his sworn affidavit, in which he states that he worked a total of 44 1/2 to 45 1/2 off-duty hours per week. Plaintiff contends that defendants cannot produce evidence that directly contradicts his affidavit. He argues, therefore, that we should grant summary judgment in his favor and declare that he is entitled to overtime compensation for 42 1/2 to 43 1/2 hours of work per week.

We acknowledge that defendants have not produced evidence in opposition to plaintiff's motion that directly contradicts plaintiff's affidavit by establishing the precise amount of work that plaintiff performed while off-duty. Nevertheless, we conclude that defendants have presented evidence that creates questions of fact concerning the amount and extent of plaintiff's off-duty work. Plaintiff has alleged that while he was off-duty, he fed, groomed, exercised, bonded with and trained Bandit. He has also alleged that he cleaned out his assigned police vehicle and personal vehicle and cleaned the kennels at the police station and at his home. He contends that he spent 44 1/2 to 45 1/2 off-duty hours per week on these activities. Chief Kehoe — who founded the K-9 unit in the Town Police Department, helped to establish the policies under which plaintiff worked and was himself a K-9 officer for four years — has, testified that he performed similar duties when

was a K-9 officer and that he never spent more than two or three hours of off-duty time per week caring for and training his police dog. *See* Kehoe Aff., at ¶¶ 2-3; Deposition of Charles M. Kehoe, dated June 10, 1996, at 79-81.

This court recognizes that different police dogs may require different amounts of care and training and that Kehoe's testimony does not directly contradict plaintiff's testimony concerning the amount of off-duty time that *plaintiff* spent caring for and training his police dog.[4] We are not persuaded, however, that it is justifiable to infer from plaintiff's recitation of the duties that he performed that he spent approximately 6 hours per day, and 44 1/2 to 45 1/2 hours per week, of off-duty time caring for and training Bandit. The striking disparity between the amount of time that Kehoe has testified that he spent on off-duty care and training of his police dog and the amount that plaintiff has asserted that he spent performing similar duties provides evidentiary support for this conclusion.

This case is therefore distinguishable from *Levering v. District of Columbia*, which is the only case that plaintiff has cited in which a court, in deciding a motion for summary judgment, fixed the amount of time per day for which the K-9 officers would be compensated for off-duty care of their assigned police dogs. In that case, the employer argued that it had adequately compensated its K-9 officers by paying fifteen minutes of overtime per day for off-duty care of their police dogs. The K-9 officers submitted only one unsupported affidavit from an officer stating that he spent thirty minutes per day on

4. We also recognize that both Kehoe and plaintiff are parties to this litigation and that each individual's affidavit is self-serving. On summary judgment, however, we cannot make determinations concerning the credibility of these individuals.

dog care. The court granted summary judgment for the K-9 officers and directed that their damages be calculated on the basis of thirty minutes per day of overtime pay for off-duty care of their police dogs. The court stressed, however, that the employer had provided absolutely no evidence in surport of its position. *See Levering,* 869 F. Supp. at 27 & n.3. Here, by contrast, defendants have introduced some evidence that calls plaintiff's testimony into question.

We therefore conclude that plaintiff is entitled to some amount of overtime compensation for work that he performed during off-duty hours caring for and training his assigned police dog. There are issues of fact, however, concerning the amount and extent of the work that plaintiff performed while he was off-duty. These issues of fact preclude us from granting summary judgment in plaintiff's favor as we cannot conclude, as a matter of law, that he worked more than two hours per week while off-duty, much less that he worked the amount of off-duty hours that he has asserted in his affidavit. Plaintiff may ultimately prove his assertions, but this issue is for a jury to resolve.

Plaintiff's argument in support of his motion relies heavily on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). That reliance is misplaced. In *Anderson*, the Supreme Court stated that in cases where an employer had failed to keep accurate and complete records of the hours worked by an employee, the employee need only prove that she performed some work for which she was improperly compensated and produce sufficient evidence from which a court could reasonably infer the amount of hours that she worked. At that point, the burden of proof shifts to the employer, who must establish the precise number of hours that she worked or produce

evidence that negates the reasonableness of the inference to be drawn from her evidence. *See Anderson,* 328 U.S. at 687-88. Plaintiff argues that defendants have failed to meet this burden.

The *Anderson* burden-shifting analysis is, however, only applicable if the employer failed to keep accurate and complete records of the hours worked by the employee. In this case, defendants contend that its records, which reflect that plaintiff regularly submitted claims for two-hours of overtime pay per week for K-9 grooming, are accurate. *See* Kehoe Aff., at ¶ 6; Exhibit 4, attached to Affidavit of Charles M. Kehoe, dated July 26, 1996. Plaintiff contends that these records are incomplete because they reflect only the hours that defendants permitted him to claim as overtime and not the hours that he actually spent caring for and training Bandit while he was off-duty. This issue, like the issue of the amount of off-duty hours that plaintiff spent caring for and training Bandit, is for the jury. The *Anderson* burden-shifting analysis will become applicable only if the jury determines that defendants' records are inaccurate.

At this time, we need not reach the question of whether plaintiff might be compensated for all of the hours that he has asserted that he spent caring for and training Bandit while he was off-duty. Defendants contend that plaintiff is not entitled to compensation for all of those hours because they did not require him to spend more than two off-duty hours per week caring for Bandit. Defendants have asserted that Kehoe told plaintiff when he was interviewed for a position as a K-9 officer that the care of a police dog required approximately fifteen minutes per day of off-duty time. *See* Kehoe Aff., at ¶ 4. Kehoe has stated that plaintiff never informed him that he was spending more than two hours per week of off-duty time caring for and

training Bandit. *See id.* at ¶ 5. Defendant argues that plaintiff cannot spend an "unreasonable" amount of time caring for his police dog and later recover compensation for all of that time by filing suit. In essence, defendants argue that all of the time that plaintiff spent caring for and training Bandit was not "work."

Plaintiff counters that defendants encouraged him to maintain his police dog at a high level of health and training and that he was doing what was necessary to fulfill that directive. He argues that it was defendants' obligation to ensure that he was not performing work for which defendants did not want to compensate him, *see* 29 C.F.R. § 785.13, and that if defendants benefitted from his activities because Bandit was well-maintained and well-trained, all of the time that he spent constitutes "hours worked" and is compensable. At this time, since it is by no means certain that plaintiff will be able to prove that he spent anywhere near 44 1/2 to 45 1/2 off-duty hours per week caring for and training Bandit, we need not resolve this issue.

With respect to plaintiff's claim for compensation for the time that he spent training Patricola's police dog, we cannot conclude, as a matter of law, that those activities are an integral and indispensable part of plaintiff's work activities. Plaintiff was, as we recognized above, obligated to train and care for his own assigned police dog. It is not at all clear, however, that providing any care or training for Patricola's assigned police dog was "part and parcel" of plaintiff's duties. Plaintiff seems to be arguing that he sought permission from Chief Kehoe to assist Patricola and that Kehoe implied that he should do so, but "off the clock." *See* Affidavit of Joseph H. Holzapfel, dated July 17, 1996, at ¶¶ 89, 90. Kehoe, however, has testified that

he denied plaintiff's request and told plaintiff that if he assisted Patricola, it would be on his own time. *See* Kehoe Aff. at ¶ 7. Furthermore, although plaintiff is a certified assistant police K-9 trainer, there is no evidence in the record that his work duties included the training of other officers' police dogs. In addition, during the time that plaintiff assisted Patricola, Patricola and his assigned police dog were receiving basic training at the Orange County Sheriff's K-9 training facility and presumably were already receiving instruction from a police dog trainer. Because we cannot conclude, as a matter of law, that plaintiff's activities in training Patricola's police dog were integral and indispensable to plaintiff's work activities, plaintiff's motion for summary judgment on this aspect of his FLSA claim is denied.

Finally, plaintiff seeks summary judgment declaring that he is entitled to liquidated damages. Any employer who violates § 207 of the FLSA is liable for unpaid compensation plus an equal amount in liquidated damages. *See* 29 U.S.C. § 216(b). Under 29 U.S.C. § 260, however,

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA), the court may, in its sound discretion, award no liquidated damages or award any (lesser] amount thereof. . . .

The employer bears the burden of establishing that it meets this standard. *Brock v. Wilaynowsky,* 833 F.2d 11, 19 (2d Cir. 1987). The burden on the employer is heavy, and liquidated damages are the norm rather than the exception in FLSA cases. *See id.*

Appendix D

Defendants have presented sufficient evidence to persuade us that a question of fact exists concerning whether they acted in good faith and with reasonable grounds to believe that they were not violating the FLSA. The Town was clearly aware that the FLSA required it to compensate its K-9 officers for caring for and training their police dogs while they were off-duty. This awareness is evidenced by the fact that the Town paid its K-9 officers for two hours of overtime per week. Plaintiff asserts that Kehoe and the Town either knew or should have known that plaintiff was spending more than two hours per week caring for and training his dog. Defendants, however, may have believed in good faith, based on Kehoe's experience as a K-9 officer, that two hours per week of overtime compensation was adequate. Kehoe has also asserted that no one in the K-9 unit ever informed him that they were spending more than two hours per week of their off-duty time caring for their police dogs. *See* Kehoe Aff., at ¶ 5. While plaintiff contends that this fact does not absolve defendants of liability for overtime compensation, a reasonable jury could consider this testimony in determining whether defendants acted in good faith. In short, questions of fact exist that preclude us from granting summary judgment on the issue of whether plaintiff is entitled to an award of liquidated damages.

Appendix D

CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment is denied.

SO ORDERED.

Date: August 1, 1996
White Plains, New York

s/ William C. Conner
Senior United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING IN BANC DATED JULY 16, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16 day of July one thousand nine hundred and ninety-eight.

Dkt No: 97-7114

Holzapfel

Plaintiffs-Appellants,

v

Town Of Newburgh, NY

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellees Town of Newburgh, Ny; Charles M. Kehoe, Chief of Police.

Appendix E

Upon consideration by the panel that decided the appeal, is Ordered that the petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: s/ Beth J. Meador
Administrative Attorney

No. 98-629

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

TOWN OF NEWBURGH, NY; CHARLES M. KEHOE, Chief of Police, Town of Newburgh Police Department,

Petitioners,

vs.

JOSEPH H. HOLZAPFEL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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15pp

QUESTION PRESENTED

In a claim for unpaid overtime under the Fair Labor Standards Act, when an employer has failed to keep record of all hours worked by its employees as required by the Act, is an employee entitled to be paid based on the actual amount of time performing work or only for some amount of time considered "reasonable" by the finder of facts?

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STATEMENT OF THE CASE

Petitioners seek to undermine long-established principles under the Fair Labor Standard Act that require an employer to pay its employees for all work "suffered or permitted" by the employer and not only for a "reasonable" amount of work determined after the fact. As detailed below there is no reason for the Court to review the decision of the Court of Appeals which correctly applied the long-established principles to the facts of this case. Contrary to petitioners' contention, there is no conflict in the circuits.

A. Factual Background

Plaintiff, Joseph Holzapfel, was a police dog handler for the police department of defendant Town of Newburgh. In his suit under the Fair Labor Standards Act ("the FLSA" or "the Act"), plaintiff claims that he performed "off the clock" overtime work with respect to his duties as a K-9 officer for the Town for which he was not compensated at time and one half his regular rate as required by the Act.

The only facts relevant to this petition relate to the "off the clock" time plaintiff spent caring for, maintaining and training his assigned dog "Bandit." The Court is respectfully referred to the concise statement of facts on this issue set forth in the opinion of the Court of Appeals. Appendix 3a-5a.[1] Petitioners' factual statement distorts some facts and omits others.

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[1] References are to the Appendix to the petition.

Of particular significance are the following two paragraphs from the opinion below, Appendix 4a-5a, omitted from petitioners' recitation of facts:

> As a standard policy, the Town of Newburgh paid K-9 officers two hours of overtime each week. Pursuant to instructions, plaintiff filled out the weekly overtime slip in advance, rather than calculate the actual off-duty hours spent with Bandit after they occurred. Although Officer Holzapfel was told that he would be paid for only two overtime hours per week, he was never directed to limit his off-duty activities to those two hours for which he was compensated.
>
> Various members of the police department, including Chief Kehoe, were aware that K-9 officers assumed additional duties. Estimates as to the time involved varied among the trial witnesses. Chief Kehoe acknowledged that the responsibilities – exclusive of training – could add up to at least one hour per day. He was also aware that K-9 officers, including plaintiff, engaged in off-duty training, but did not know how much extra time these officers spent off-duty with their dogs.

The evidence therefore established that the plaintiff, Officer Holzapfel, was "suffered or permitted" to perform uncompensated "off the clock" work caring for, maintaining and training his assigned police dog.

B. Proceedings Below

Prior to trial, the district court had correctly determined, following well established precedent, that "a K-9

officer must be compensated for the off-duty time that he spends performing the tasks involved in caring for and training his assigned police dog, unless the time devoted to a particular task is *de minimis*." Appendix 59a. The primary issue at trial was how much uncompensated overtime plaintiff spent performing these tasks.

At the trial, rather than defining the activities that constituted compensable work and requesting the jury to determine how much time plaintiff had engaged in this work "off the clock," the district court formulated a verdict question and jury instructions that required the jury to limit the amount of work for which plaintiff could recover by two conditions. Petitioners neglect to quote the verdict question. It appears at Appendix 6a:

> Has the plaintiff Joseph H. Holzapfel proved by preponderance of the credible evidence that he spent additional time, over and above the 40 hours of regular time and 2 hours of overtime for which he was compensated, in performing work which was (1) *reasonably necessary* to fulfill his duties of feeding, grooming, caring for and training the K-9 unit dog assigned to him and (2) which could not *reasonably be performed* within such 42 hours of compensated time per week. (Emphasis in original).

The district court also gave the jury the instructions quoted by petitioners on pages 3-4 of the petition.

The Court of Appeals determined that the verdict question and instructions were reversible error. With respect to the first "condition" of the verdict question, the Court of Appeals held that employees are to be paid for their "work" and that the jury should have been

instructed on the definition of "work" under the law, which contains no limitation based on the reasonable necessity of the work.

With respect to the second "condition" of the verdict question – which the district court, in its decision denying plaintiff's post-trial motion, justified on the grounds that it addressed the employer's constructive knowledge of plaintiff's off the clock work – the Court of Appeals held that "more than one way exists to show constructive knowledge, and it is not exclusively dependent on whether assigned duties could reasonably be performed in an allotted number of hours." Appendix 17a-18a. Therefore, the Court determined that the verdict question and instruction were "too limited," Appendix 18a, and that the jury might have reached a different result had appropriate instructions been given.

The Court of Appeals affirmed the district court's second verdict question, which is unrelated to the issue presented by the petition.

REASONS FOR DENYING THE WRIT

The decision below was a correct application of settled law and no conflict among the circuits exists.[2]

[2] Petitioners seek review of the decision below only with respect to the first condition of verdict question 1. The petition does not address the reversal by the Court of Appeals based on the error of the second condition in the verdict question relating to the constructive knowledge of the employer.

The Fair Labor Standards Act requires that employers pay employees time and one-half their regular rate for all "work" done over 40 hours per week. Employees are to be paid for all work that is "suffered or permitted" by their employer.[3] 29 C.F.R. § 785.11.[4] When an employer "knows or has reason to believe" that work is being done, the employer is obligated to count the time as work time. *Id.*

It is the employer's obligation under the Act to keep accurate records of the hours worked by its employees. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2. In the absence of such records, an employee may recover unpaid overtime based on estimates of the hours worked and the employer may not complain about the inexactness of the result. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946).

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[3] The requirement of overtime pay for hours over 40 in a workweek is set forth in 29-U.S.C § 207(a)(1) which provides that an employer shall not "employ" an employee for a workweek longer than forty hours without paying for the hours over 40 at time and a half the regular rate. Title 29 U.S.C. § 203(g) provides that " 'employ' includes to suffer or permit to work."

[4] 29 C.F.R. § 785.11 provides:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task, or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. [citations omitted].

A. Employees are entitled to be paid for all overtime work suffered or permitted and not just some "reasonable" amount of work.

Under long-established law employees are entitled to be paid based on all the work they perform, not just for a "reasonable" amount of work. An employer may not avoid wage liabilities for uncompensated overtime work on the grounds that the work was not "reasonable" or not "reasonably necessary." An activity is either work or it is not. If it is, the employer is obligated to pay wages based on "all" work suffered or permitted. 29 C.F.R. §§ 778.223, 778.315, 785.11; *see, e.g., Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) ("To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of the [Act]."); *Donovan v. United States Postal Service*, 25 Wage & Hour Cas. (BNA) 58, 92 Lab. Cas. (CCH) ¶34,124, 1981 U.S. Dist. LEXIS 17145 at *45-46 (D.D.C. 1981) ("The policies underlying the FLSA do not permit an employee [*sic*; should be "employer"] to unilaterally decide how much time is reasonably spent by an employee at a given task while permitting the employee to continue at that activity. Rather, the policies underlying the FLSA support one provision – employees must be paid for work suffered or permitted by their employer."); *Adams v. United States*, 36 Fed. Cl. 91, 95 (1996) (compensation required for "all time during which an employee is suffered or permitted to work whether or not he is required to do so."). The issue under the FLSA is the "amount of time spent," not the amount of time that "could have been spent" under different circumstances.

See, e.g., Skipper v. Superior Dairies, Inc., 512 F.2d 409, 418 (5th Cir. 1975) (Because another employee could or did perform same duties in less time is not a reason plaintiff is to be paid less than the "hours actually worked by him."); *Donovan v. Kentwood Development, Inc.*, 549 F.Supp. 480, 488 (D. Md. 1982) ("It is immaterial whether it was necessary for [the employee] to work long hours, so long as he did, with the actual or constructive knowledge of his employer."); *Hodgson v. Rancourt*, 336 F.Supp. 1119, 1123-24 (D.R.I. 1972) (mere generalization as to what other employees might possibly be able to do not sufficient to rebut employee's evidence of hours worked).[5]

This rule is fundamental to FLSA jurisprudence. Any other rule would result in employees being "allowed" to perform work without compensation. *Tony and Susan Alamo Foundation v. Sec. Labor*, 471 U.S. 290, 302 (1985). The rule in no way restricts an employer from avoiding overtime liabilities, nor does it in any way imply that employees have a "blank check" to obtain wages an

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[5] Other cases confirming that employees are entitled to compensation for the "actual time" worked include: *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946) (employees to be paid for hours "actually worked"); *Reich v. New York City Transit Authority*, 45 F.3d 646, 651-652 (2d Cir. 1995) ("actual duties" of care, feeding, training, walking or cleaning up after police dog during commute is compensable work); *Reich v. Waldbaum*, 833 F.Supp. 1037, 1044 (S.D.N.Y. 1993), *rev'd on other grounds*, 52 F.3d 35 (2d Cir. 1995); *Bledsoe v. Wirtz*, 384 F.2d 767, 771 (10th Cir. 1967) ("amount of time spent"); *Treece v. Little Rock*, 923 F.Supp. 1122 (E.D. Ark. 1996) (trial issue was "actual time" spent performing compensable activities); *Truslow v. Spotsylvania County Sheriff*, 783 F.Supp. 274, 279 (E.D. Va. 1992), *aff'd*, 993 F.2d 1539 (4th Cir. 1993) (unpublished).

employer may not wish to incur. It merely means that the employer's ability (and responsibility) to control and restrict the work of employees is at the "front end," not the "back end." *See Donovan v. United States Postal Service*, 25 Wage & Hour Cas. (BNA) 58, 92 Lab. Cas. (CCH) ¶34,124 (D.D.C. 1981). Contrary to the suggestion by petitioners (petition at 6), the ability of the employer to "directly supervise" the employee is irrelevant to the employer's obligation to pay for all work. The rule applies to work away from the work site and even at home. 29 C.F.R. § 785.12;[6] 29 C.F.R. § 785.13.[7]

An employer may certainly restrict the amount of work performed by an employee, or require that work not be performed during off the clock time. If an employer believes an employee is inefficient, it may of course require the employee to "work faster," or provide additional training or supervision, or even discipline or fire the employee. *See Clark v. Atlanta Newspapers*, 366 F.Supp. 886, 896 n. 16 (N.D. Ga. 1973). Employers have a

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[6] 29 C.F.R. § 785.12 provides:

> The rule is also applicable to work performed away from the premises or job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

[7] 29 C.F.R. § 785.13 provides:

> In all cases it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

"duty to inquire" about whether their employees are performing compensable work, and an employee's failure to report hours worked is no defense in an FLSA case. *Reich v. Dept. of Conservation and Natural Resources, State of Alabama*, 28 F.3d 1076, 1082 (11th Cir. 1994), citing *Gulf King Shrimp v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959). What an employer may not do is suffer or permit an employee to perform work and not pay for all the work performed.

Thus, the Court below correctly determined that verdict question 1 and instructions were plainly in error to the extent they limited plaintiff only to time worked that was "reasonably necessary."

B. There is no conflict in the Circuit Courts

There is no conflict in the circuit courts justifying the granting of the Writ. The Court below correctly limited the holdings of the cases relied on by petitioners to their facts. Appendix 18a-19a. The cases certainly do not stand for the general proposition urged by petitioners that employees are only to be paid for a "reasonable" amount of time rather than for all work suffered or permitted.

In the case of *Reich v. IBP, Inc.*, 820 F.Supp. 1315, 1324 (D. Kan. 1993), *aff'd and remanded*, 38 F.3d 1123 (10th Cir. 1994), *on remand*, 3 Wage & Hour Cas.2d (BNA) 324, 1996 U.S. Dist. LEXIS 3709, the employees had not been paid for off the clock time spent "putting on, cleaning, and taking off . . . unique personal protective gear." 38 F.3d at 1127. The difficulty was that these compensable (but

uncompensated) activities were "intermingled" with a variety of non-compensable activities which had occurred during the same period. *See* 3 Wage & Hour Cas.2d 324, 1996 U.S. Dist. LEXIS 3709, at *12 n. 4. The compensable time itself was, of course, the actual time spent by the employees performing compensable work. However, the difficult task was to separate the compensable portion of the time spent from the noncompensable portion. The district court did so by estimating a "reasonable time" for the employees to have performed the compensable activities. Thus, the court's "reasonable time" language described a methodology for estimating the actual, compensable time involved. The Tenth Circuit upheld this methodology "in this case." 38 F.3d at 1127.

Amos v. United States, 13 Cl. Ct. 442 (1987), involved the similar question of how much time was involved in employees traveling to and from a control room at a prison to obtain equipment needed for their duties. The *Amos* court decided to award the employees under these circumstances a "reasonable time" for these activities, commenting that otherwise some employees could be rewarded for "lack of diligence in getting and returning the equipment and in walking to and from this work station and, conversely, penalizing those of the plaintiffs who may have taken less than reasonable amount of time doing these activities." 13 Cl. Ct. at 450. Petitioners rely heavily on this language. However, the *Amos* court got the law "backwards." It is the *employer's* "lack of diligence" which the FLSA does not permit to be "rewarded." It is up to the *employer*, not the employee, to "control" the work. 29 C.F.R. § 785.13. The *Amos*'s court's

notion that those employees spending less than a reasonable time to perform an activity should not be "penalized" for being efficient and should be paid for more time than they actually worked is completely foreign to the statutory language and established FLSA law. *Amos* in effect rewrites and revolutionizes the FLSA, changing it from a statute intended to spread employment by requiring wages based on all hours worked, to one intended to encourage worker productivity by requiring payment only for "reasonable time." Of course, Congress intended no such result.

CONCLUSION

The Court of Appeals correctly applied established law to the facts of this case. There is no need or basis for this Court to review the Second Circuit's decision. The petition should be denied.

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Respectfully submitted,

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